956

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 94.

LINDLEY E. SINCLAIR, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 23, 1902.

(18,617.)

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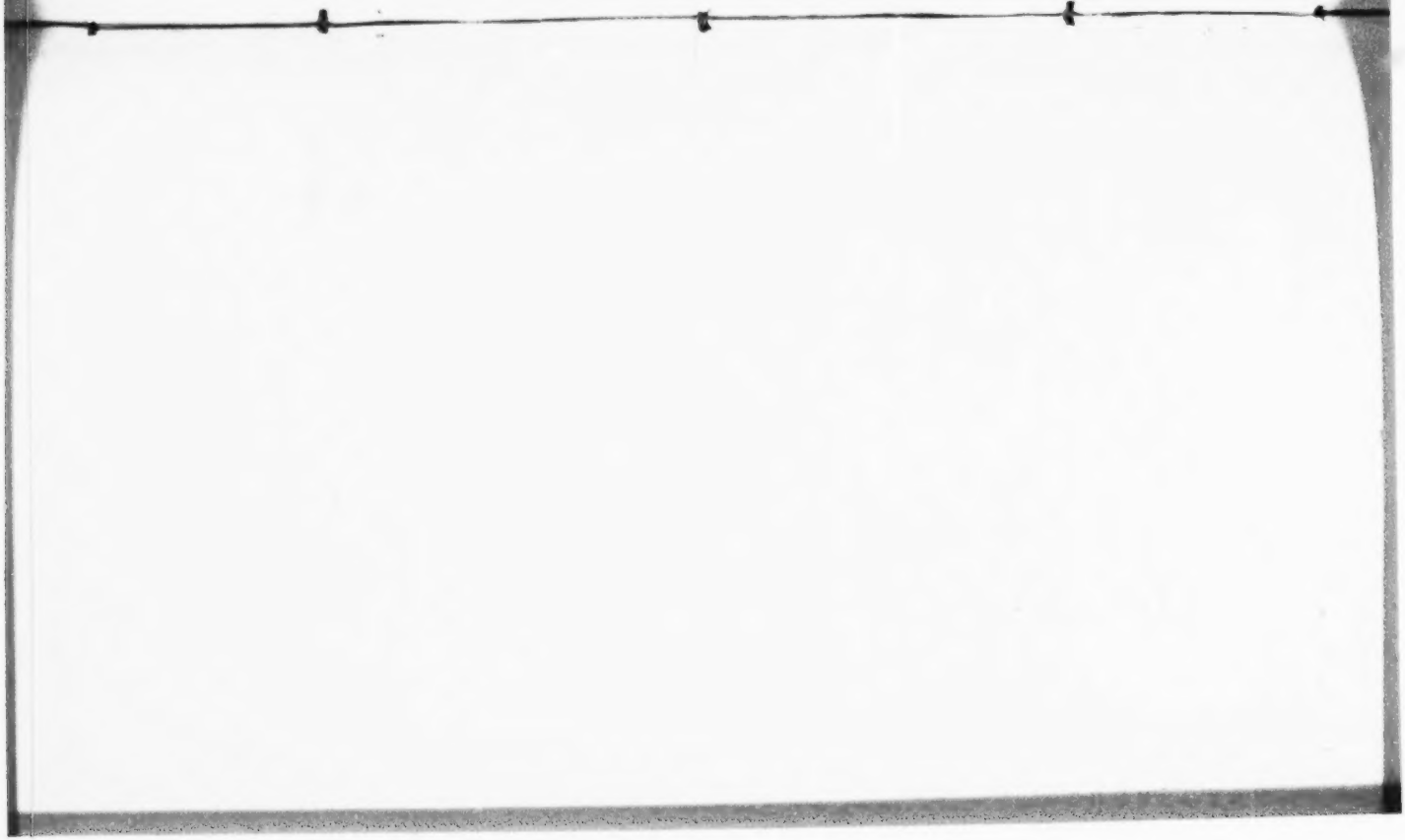


1 In the Court of Appeals of the District of Columbia.

LINDLEY E. SINCLAIR, Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA. } No. 1218.

In the Police Court of the District of Columbia, March Term, 1902.

DISTRICT OF COLUMBIA
vs.
LINDLEY E. SINCLAIR. } No. 218,083. Information for Violation of Law for Prevention of Smoke.

Be it remembered that in the police court of the District of Columbia, at the city of Washington, in the said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

In the Police Court of the District of Columbia, February Term, A. D. 1902.

THE DISTRICT OF COLUMBIA, *ss:*

Andrew B. Duvall, Esq., city solicitor for the District of Columbia, by James L. Pugh, Jr., Esq., assistant city solicitor for the District of Columbia, who for the said District prosecutes in this behalf in his proper person, comes here into court and causes the court to be informed and complains that Lindley E. Sinclair, late of the District of Columbia aforesaid, on the 11th day of February, in the year A. D. nineteen hundred and two, in the District of Columbia aforesaid and in the city of Washington, being then and there the occupant of a certain building, to wit, the building situated at number 213 14th street northwest, in the city aforesaid, in the District aforesaid, to which said building there is attached a smokestack and chimney used in connection with a certain stationary engine, steam boiler, and furnace in said building, the said Lindley E. Sinclair, as such occupant, did then and there unlawfully cause, permit, and allow the emission into the open air from the said smokestack and chimney, situated as aforesaid, certain thick and dense black and gray smoke, which was then and there a public nuisance, contrary to and in violation of an act of Congress for the prevention of smoke in the District of Columbia, and for
2 other purposes, approved February 2, 1899, and constituting a law of the District of Columbia.

ANDREW B. DUVALL, Esq.,
City Solicitor for the District of Columbia.
By J. L. PUGH, Jr.,
Assistant City Solicitor for the District of Columbia.

Personally appeared F. L. Wollard this 18th day of February, A. D. 1902, and made oath before me that the facts set forth in the foregoing information are true, and those stated upon information received he believes to be true.

JOSEPH HARPER,
Deputy Clerk of the Police Court
for the District of Columbia.

[Endorsed:] Col. —. No. 218,083. Information. District of Columbia *vs.* Lindley E. Sinclair. Mar. 26, guilty. J. T. D. Violation of act for the prevention of smoke. Concealed weapons. P. W. G. Witnesses: F. L. Wollard, officer; H. S. Bolton, James B. Lackey, John B. Sullivan. 4–17. 50–90. Ap. noted. 3–25, 26. Filed March 18, 1902. Joseph Y. Potts, clerk police court, D. C.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Charles F. Scott, judge of the police court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said police court, before you, between The District of Columbia, plaintiff, and Lindley E. Sinclair, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Richard H. Alvey,
Seal Court of Appeals, District of Columbia. Chief Justice of the said Court of Appeals, the 25th day of April, in the year of our Lord one thousand nine hundred and two.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by—

SETH SHEPARD,
Associate Justice of the Court of Appeals
of the District of Columbia.

3 In the Police Court of the District of Columbia, March Term, 1902.

DISTRICT OF COLUMBIA vs. LINDSLEY E. SINCLAIR. } No. 218,083. Information for Violation of Law for Prevention of Smoke.

Defendant arraigned March 6, 1902; plea, not guilty; jury trial demanded.

Mar. 26.—Verdict, guilty.

April 17.—Judgment, guilty; sentence, to pay a fine of fifty dollars and in default to be committed to the workhouse for the term of ninety days.

Exceptions taken to rulings of court on matters of law and notice given by defendant in open court, at the time of several rulings, of his intention to apply to a justice of the Court of Appeals, D. C., for a writ of error.

Mar. 28.—Motion for new trial filed; motion overruled.

Mar. 28.—Bill of exceptions filed.

April 4.—Stipulation of counsel filed extending time for presentation of bills of exceptions to court for settlement and signature.

April 17.—Appeal noted; bills of exceptions settled and signed.

Recognizance in the sum of $100 entered into on writ of error to Court of Appeals, D. C., upon the condition that in the event of the denial of the application for a writ of error the defendant will, within five days next after the expiration of ten days, appear in police court and abide by and perform its judgment, and that in the event of the granting of such writ of error the defendant will appear in the Court of Appeals of the District of Columbia and abide by and perform its judgment in the premises.

George H. Harries, surety.

Thereupon proceedings stayed for ten days.

April 25.—Writ of error received from Court of Appeals.

MAY 8TH, 1902.

I hereby certify under the seal of this court that the foregoing is a true copy of the record of the proceedings had in the police court in the above-entitled case.

JOSEPH HARPER,
Dep. Clerk, Police Court, Dist. of Columbia.

In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA
vs.
LINDLEY E. SINCLAIR. } No. 218,083.

Motion for New Trial.

Now comes the defendant in the above-entitled cause and moves the court to set aside the verdict of the jury rendered therein and to grant a new trial for the following reasons:

4 1. Because the act of Congress under which the defendant was proceeded against is unconstitutional.

2. Because the verdict is contrary to the evidence.

3. Because the verdict is contrary to law.

4. Because of errors of law committed by the presiding justice at the trial.

J. J. DARLINGTON,
C. C. COLE,
Attorneys for Defendant.

Notice.

The above motion will be called to the attention of the police court of the District of Columbia, Mr. Justice Scott presiding, on Tuesday, the first day of April, A. D. 1902, at 10.30 o'clock a. m., or as soon thereafter as counsel can be heard.

J. J. DARLINGTON,
C. C. COLE,
Attorneys for Defendant.

In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA
vs.
LINDLEY E. SINCLAIR. } No. 218,083.

DISTRICT OF COLUMBIA
vs.
LINDLEY E. SINCLAIR. } No. 219,243.

It is, this third day of April, 1902, stipulated and agreed that the bill of exceptions in the above-entitled cases may be presented to the court for settlement and signature on the eighth day of April, 1902.

E. H. THOMAS,
JAMES L. PUGH, JR.,
Counsel for Government.
C. C. COLE,
W. C. SULLIVAN,
Counsel for Defense.

Filed March 28, 1902. Joseph Y. Potts, Clerk Police Court, D. C.

In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA
vs.
LINDLEY E. SINCLAIR. } No. 218,083.

Bill of Exceptions.

At the trial of this case, begun on the 25th day of March, A. D. 1902, before Charles F. Scott, Esquire, one of the justices of the police court of the District of Columbia, and the jury impanelled and sworn to try the issues in said cause, the District of Columbia, to maintain the issues upon its part joined in said cause, produced as a witness on its behalf one FRANK WOLLARD, who testified that he is one of the inspectors of the health office detailed to investigate and observe the smoke nuisance; that on the 11th day of February, 1902, he observed the smokestack of the electric lighting company at the plant of that company at 213 14 street northwest from the roof of the District building, and that dense black smoke was emitted from the stack from 10.48 to 10.52 a. m., from 11.10 to 11.12 a. m., from 11.26 to 11.30 a. m., from 1.15 to 1.20 p. m., all on said day; that he has since visited said place, and that the smoke comes from the black, round, iron stack of the U. S. electric plant and chimney which is attached to thirteen furnaces and boilers and eight stationary engines in the plant of that company; that the defendant has an office in that building over which is a sign reading, "Office of the general superintendent," and that his room is on the second floor of the building.

Upon cross-examination the witness stated that he was detailed by the Commissioners or by the health office to make these smoke observations about two months ago, and he was thereupon interrogated and answered as follows:

Q. What observation did you make to determine whether this smokestack of which you speak proceeds from the roof of the building No. 213 Fourteenth street northwest?

A. The stack is plainly visible from the top of the District building.

Q. Yes; but you cannot see the number "213 Fourteenth street" from the top of the District building, can you?

A. I afterwards made two visits to No. 213 Fourteenth street northwest and found the stack that I saw from the roof of the District building was connected with that number.

Q. How is it connected with No. 213?

A. It rises from about the center of the building—those premises.

Q. From the center of 213 Fourteenth street? You are positive of that, are you?

Mr. THOMAS: He said "those premises."

A. Those premises. I said from the premises of the electric lighting company.

By Mr. DARLINGTON:

Q. By "those premises" you mean 213 Fourteenth street, do you?

A. I mean the plant of the U. S. Electric Light Company.

Q. Will you not please answer my question? I did not ask you anything about the plant of the company. I asked you what means you had taken to verify your statement that this smokestack proceeds from premises 213 Fourteenth street?

A. I told you that it comes from the center of the building known as 213 Fourteenth street northwest.

6 The witness further testified that he does not know that there is a twenty foot space between 213 Fourteenth street and the power-house with which the smokestack is connected.

Thereupon, further to maintain the issue upon its part joined, the District of Columbia produced as a witness on its behalf one HENRY S. BOLTON, who testified that he was the engineer of the United States Electric Lighting Company's power plant at 14th and B streets northwest, in the city of Washington; that the witness Bolton is in charge of the machinery and all the men employed in the said power plant or station, including the men employed on the furnaces and on the engines and the firemen; that the defendant Sinclair is his superior officer and was such on the 11th day of February, 1902, and that he does not know who purchased the coal used at the said station.

Q. To whom do you make your reports?

A. Mr. Sinclair.

Mr. DARLINGTON: One moment. I object. Mr. THOMAS: He has answered it. Mr. DARLINGTON: Very well, go ahead. I object, if the court please, because those reports are in writing and they will show to whom they are made. They are the only competent legal evidence. Mr. PUGH: There is no proof here yet showing that they are written reports, Mr. Darlington. Mr. DARLINGTON: Then I object to the question. Mr. PUGH: He said that he made his reports to Mr. Sinclair. Mr. DARLINGTON: *Well*, the answer was made before I could object to it. The objection is that this is not competent, but when you are calling for a report your question must show whether you mean a written or verbal report, and if in writing it must be produced. The COURT: What is the objection now? Mr. DARLINGTON: The witness has answered the question. The objection is to the question, to whom he made his reports. That would be shown by the reports themselves. They are in writing and they are the only competent evidence. The COURT: Your objection is overruled, there being as yet no evidence to show whether written or oral. Mr. DARLINGTON: And I note an

exception. The witness further testified that his reports were sometimes verbal and sometimes in writing, and that the written reports and also the verbal ones were made to the defendant Sinclair; that the witness has been identified with this plant since April, 1901, and that the defendant has been his superior officer since that time, and that the defendant's official designation is general superintendent, U. S. Electric Lighting Company.

Q. What control did he exercise over those premises?

Mr. DARLINGTON: I object to that question as calling for an opinion of the witness. I have no objection to testimony as to any facts, any instances of control, but it is not for this witness to give his opinion as to what Mr. Sinclair's control is.

Mr. THOMAS: I only want him to tell what he has seen him do and what he knows he does.

7 Mr. DARLINGTON: I have no objection to that.

The WITNESS: There are a great many things he does as general superintendent.

By Mr. THOMAS:

Q. What are they?
A. I cannot enumerate them.
Q. Are they too many?
A. They are too many.
Q. What does he do with reference to the running and control of that particular plant?
A. He takes no active part in it.

* * * * * * *

Q. You say he gave you orders?
A. I have received orders from Mr. Sinclair.
Q. Orders to do what?
A. Oh, different things. I do not recall any particular order.
Q. You do not recall any particular order? Who employed you there?
A. Mr. Sinclair.
Q. Did you make any arrangements with him about the rate of pay?
A. I did.
Q. Do you employ the others under you there?
A. I do.
Q. Do you submit the matter of their employment to Mr. Sinclair?
A. I do not.
Q. Mr. Sinclair employed you, and your general employment was to have control of those under you? Is that it?

Mr. DARLINGTON: I object to the question as leading.

A. Yes, sir.

By Mr. THOMAS:

Q. Are there firemen under you?
A. There are.
Q. How many firemen are there?
A. Twelve.
Q. What are their duties?
A. To fire the furnaces.

Thereupon the witness was asked what kind of coal is used at said power plant; to which question the defendant objected on the ground that it *is* already appeared from the testimony of the witness that he did not know who purchased the coal; that the defendant took no active part in the running of the furnaces or engines, and that any inquiry as to the kind of coal used there was incompetent, immaterial, and inadmissible as against the defendant; but the court overruled the said objection and permitted the witness
8 to answer that the coal used was bituminous; to which ruling then and there — noted an exception, which was duly allowed.

Thereupon the witness further testified that the offices of the defendant Sinclair was in number 213 14th street northwest, and that this building is across an alley from the plant, but whether it is a private or public alley witness could not say; that there are gates at the entrance to this alley, used to close this alley, extending from the north wall of the power plant to the south wall of number 213 14th street, and that through this alley coal and supplies of different kinds are brought into the power plant, the gates being opened when the carts or wagons come in and closed when they go out.

Upon cross-examination the witness Bolton testified that the vacant space between the power plant and number 213 14th street is about eighteen feet; that witness had charge of the machinery and of all the men employed in the plant and the furnaces and the firing; that he recalls no order from the defendant in any manner concerning the firing or running of the furnaces, boilers, or engines; that the witness is paid by the United States Electric Lighting Company, not by Sinclair, and that in testifying that Sinclair employed him he simply meant that Sinclair made the contract with him to work for the company. Q. You have made some reference to certain reports as being made to Sinclair. Are those reports made to Sinclair or to the company? A. They are made to Mr. Sinclair. Q. Are they in writing or oral? A. Both; generally in writing. Q. Mr. Bolton, is your recollection clear that these reports of which you speak are not addressed to the United States Electric Lighting Company? A. It is.

Upon redirect examination the witness stated that he could not say whether there was any distinct statement made as to whom he was employed for at the time the contract was made with Sinclair; that the power station fronts about 120 feet on 14th street and 220 feet on B street, and that it does not include number 213 14th street;

that he is speaking of the building containing the machinery and is cutting out the eighteen-foot alley; that the building comprised within said 120 feet on 14th street and 220 feet on B street is the building containing the machinery, and that it is situated at 14th and B streets; that the fence or gates simply run from the north wall of the power plant to the *the* south wall of number 213 14th street, but connects from building wall to building wall, parallel to the building line of the street where the machinery is. Q. Does not the same fence connect the premises? A. There is a gate across the alley from the building containing the machinery. Q. Does that connect the premises? A. I don't know. Q. Do you know what "connect" means? A. No. Q. You do not? A. Not in a legal sense. Q. Well, in general, common sense, ordinary sense? A. Why, certainly; there is a gate connecting one building to the other. Q. The premises are connected, then, are they not, in that manner? Mr. DARLINGTON: Connected by a fence between them?

Mr. THOMAS: Yes. A. Yes.

9 Upon further cross-examination witness stated: Q. "Is number 213 14th street fenced in at all, Mr. Bolton? Is there any fence around you? A. No; I should say not. I do not know." Witness further stated that the defendant Sinclair has no office or desk or anything else in the building which contains the machinery; that there is no number at all on any building except the office building; that persons going to pay bills due the electric lighting company would go to the treasurer's office, which is 213 14th street, the building in which the defendant has his offices; that the power-plant building has no number upon it, and 213 was the only one with a number on it; that the building in which Sinclair's office is located is number 213 14th street; that he has seen the defendant there frequently; that he cannot say whether there are any other houses along there which have numbers upon them; that he obtained his coal and other supplies by drawing a requisition upon the storekeeper, who is E. McCarthy; that his requisition bills come from the storekeeper to witness, who checks them as approved by him, and returns them to the storekeeper, and that he does not know whether they ever come into the hands of Sinclair or not. Thereupon counsel for the defendant produced a number of written reports made by witness to the defendant, and the witness testified that they were his daily reports of the amount of work done by the station; that they were the reports of the electrical output of the station, and that the report of February 11th shows such output for that day; that the witness makes other written and verbal reports to the defendant at times about the general condition of the machinery or anything that arises that makes necessary a report.

Thereupon the District of Columbia announced its case closed; and thereupon the defendant introduced evidence and produced witnesses who testified as follows:

JAMES B. LACKEY, a witness called on behalf of the defendant, testified that the said Sinclair is an employé of the United States Electric Lighting Company, appointed by one of its general officers, either the treasurer or the vice-president; that he is not a general officer or an elective officer, elected by either the stockholders or the board of directors, but is appointed by either the treasurer or vice-president, and that his manner of appointment does not differ from linemen, motormen, or other employés of that character; that his office is in the building designated as number 213 14th street, which is not connected in any way with the power-plant building, from which latter building the smokestack proceeds and where the smoke is created and discharged; that the power plant was formerly at 13½ and B streets, on the other corner of the square, the office being then, as now, at 213 14th street, and that a few years ago the power plant was erected at the northeast corner of 14th and B streets; that the buildings on 14th street belonged to the lighting company and used for its different purposes are five in number, namely, numbers 213, 215, 217, 219, and 221, 14th street; that the defendant Sinclair had no office, desk, or other occupancy of the power-plant building, which is an entirely separate building from 213 14th —, and that the occupant of the power-plant building is the electric lighting company, by which employer Sinclair is located in a different building from its power plant.

Upon cross-examination this witness was asked the following: Q. Were you present when Mr. Sinclair was employed? A. (After a pause.) I have been present at conferences of the officers when his appointment—— Q. Were you present when Mr. Sinclair was employed? That is the question. A. I can fairly say that I took part in his employment. Q. I am not asking you what you can fairly say. I ask if you were actually present when he was employed? A. What do you mean by his employment? Do you mean when he was told that he should go to work—— Q. I mean what I say. Were you actually personally present when he was hired? Mr. DARLINGTON: I submit, if the court please, that the question is a very vague one. In the employment of a man by a company like this there are at least two steps. There is, first, the determination of the officers to appoint him. There is, second, the personal communication to him. I think the witness has a right to ask to which of these things my friend refers. Mr. THOMAS: The witness has testified from personal knowledge, presumably, that Mr. Sinclair was employed by some manager, or the president of the company. Now, I want to know from him whether he was personally present when he was hired. That, I submit to the court, is a very simple question. The COURT: That may be answered. The WITNESS: I would not be able to answer that question, Judge, until he specifies just what he means by asking whether I was present when he was employed or not. If he means if I was present when some officer stated to Mr. Sinclair that he should be superintendent—— Mr. THOMAS: Mr. Lackey, you have counsel here who will take care of you, and you need not argue the case. Mr. DARLINGTON:

The witness has a right to state his difficulty in answering the question. The WITNESS: I am unable to answer your question, because it is not clear to me. Mr. THOMAS: Never mind, sir; if you are unable to answer it, that is all I want to ask you on that particular point. The witness further stated that number 217 14th street is a store-room, used in part for the United States Electric Lighting Company and in part by the Potomac Electric Light and Power Company; that number 219 14th street is used in part as a store-room and in part as a lamp department and office for workmen and other employés, as is also number 221 14th street; that there is no number on the power-plant building; that premises number 213, 217, 219, and 221 are among the various offices of the company; that there is no office of the company, nor any of its officers, in said power-plant or machinery building, except that Bolton, the engineer of the station, has an office there.

On redirect examination, this witness testified that the Potomac Electric Power Company also has an office in No. 213 14th street, and that the general officers of the United States Electric
11 Lighting Company are a president, a vice-president, a secretary, a treasurer, and general manager, the latter being H. W. Fuller, and that the purchase of fuel is directed by the general officers of the company; that there is no record of such purchase except correspondence with dealers, or it may be by conversations, from whom it was purchased, and that there is no complete record of coal purchases.

Thereupon the defendant produced as witness on its behalf JOHN T. SULLIVAN, who testified that he was a steam engineer by occupation, and that he had ten years' experience in operating furnaces and plants for the production of electricity either for lighting or for motive power; whereupon the witness was asked the following question: What can you tell us as to the possibility of conducting or operating a plant which will produce power for lighting purposes without the emission at times of dense gray or black smoke? To this question counsel for the District of Columbia objected; whereupon counsel for the defendant stated: If the court please, this is a formal proof as to which I concede I think your honor is concluded by the opinion of the Court of Appeals. Of course, it is for you to decide about that. The point I propose is this: This company, under the express or implied license of Congress, or both, has expended a very large amount of money in establishing a plant here in the District of Columbia. It is charged with great public duties. The lighting of the streets of the city is a part of its duty, in addition to the illumination of public and private residences and business houses. It is under a legal obligation to perform this work. It would be liable in damages if it refused. The point that I wish to make is that any act, especially an act passed after a company has been authorizen and directed to expend large sums of money in installing costly and important public improvements, which deprives it of the power of using its property, an act which disables it from perform-

ing a public duty, for the neglect of which or the failure to perform which it would be liable in damages, would be an unconstitutional act; and if we can prove to the satisfaction of the jury that the emission of such smoke under such circumstances as shown in this case is absolutely indispensable to the company's enjoyment of its property and to the performance of its public duties which it is obliged to perform, then to that extent the act would be unconstitutional. We offer this testimony in that connection, and we offer to prove the facts to which we refer. Mr. PUGH: To that we object, if your honor please. The COURT: Have you anything to say on the matter, gentlemen? Mr. THOMAS: We contend, your honor, that that point was expressly passed upon and decided in the Moses case. The COURT: The objection is sustained. Mr. DARLINGTON: We except to the exclusion of the evidence; which exception was duly allowed.

Thereupon, the foregoing being all the evidence in the case, the District of Columbia requested the court to instruct the jury as follows:

1. That the jury are instructed that the emission of dense
12 or thick black or gray smoke from any smokestack or chimney used in connection with any stationary engine, steam boiler, or furnace of any description within the District of Columbia is a public nuisance.

To the granting of which instructions the defendant then and there objected; but the court overruled his said objection and granted the said instruction; to which the defendant then and there excepted; which exception was duly noted on the minutes of the court and allowed.

2. The jury are instructed that they are not at liberty to consider the policy of Congress in declaring in its act approved February 2, 1899, that the emission of dense or thick black or gray smoke — a public nuisance, as defined by the court in prayer No. 1, nor the necessity or supposed inconvenience or hardship, if any, of such law, and that the policy of enacting such law is a matter peculiarly and exclusively within the province of Congress, which cannot be disregarded or be set aside by either the court or the jury.

To the granting of which instruction also the defendant then and there objected; but the court overruled his said objection and granted the said instruction; to which the defendant then and there excepted; which exception was duly noted on the minutes of the court and allowed.

3. The jury are instructed that if they find from the evidence that the defendant at the time charged in the information had an agency in the control of the furnace at the premises mentioned in the information and evidence, then he was an occupant of said premises and building within the meaning of the act of Congress under which he is now proceeded against.

To the granting of which instruction the defendant then and there objected; but the court overruled his said objection and granted the

said instruction; to which the defendant then and there excepted; which exception was duly noted on the minutes of the court and allowed.

4. The jury are instructed that if they find from the evidence that the defendant was the superintendent of the owner of said building mentioned in the information and evidence, and had control of the furnace or of the engineer or other persons, if any, who operated the same at the time mentioned in the information, then the defendant is an occupant of said building within the meaning if the act of Congress under which he is now proceeded against.

To the granting of which instruction the defendant then and there objected; but the court overruled his said objection and granted the said instruction; to which the defendant then and there excepted which exception was duly noted on the minutes of the court and allowed.

5. If the jury believe from the evidence that Lindley E. Sinclair, named as defendant in the information in this case, was, on the 11th day of February, 1902, the superintendent of the building situated at 14th and B streets northwest, in the city of Washington, District of Columbia, described in the information as 213 14th street
13 northwest, and known as the plant of the United States Electric Lighting Company, then in contemplation of law he was the occupant of said building.

To the granting of which instruction the defendant then and there objected; but the court overruled his said objection and granted the said instruction; to which the defendant then and there excepted; which exception was duly noted on the minutes of the court and allowed.

Thereupon the defendant prayed the court to grant the following instruction-:

1. That the jury are instructed to return a verdict for the defendant.

Which instruction was objected to on behalf of the District of Columbia and was rejected by the court, and to the refusal of the court to grant the said instruction the defendant then and there excepted, and the exception was noted upon the minutes of the court and duly allowed.

2. The jury are instructed that there is no evidence in this case from which they are entitled to find that the defendant was the occupant of No. 213 14th street northwest on the 11th day of February, 1902, as charged.

Which instruction was objected to on behalf of the District of Columbia and was rejected by the court, and to the refusal of the court to grant the said instruction the defendant then and there excepted, and the exception was noted upon the minutes of the court and allowed.

3. The jury are instructed that they must acquit the defendant unless they believe from the evidence that he was, on February 11th, 1902, an occupant of the building from the smokestack or

chimney of which there issued or was emitted the smoke described in the testimony in this case.

Which instruction was objected to on behalf of the District of Columbia and was rejected by the court, and to the refusal of the court to grant the said instruction the defendant then and there excepted, and the exception was noted upon the minutes of the court and duly allowed.

4. The defendant is entitled to a verdict of acquittal unless the jury find from the evidence that he was, on February 11th, 1902, the occupant of No. 213 14th street N. W., and that he participated in or controlled the use of the furnaces, boilers, stationary engines, or other machinery or appliances which caused or emitted the smoke shown by the evidence in this case.

Which instruction was objected to on behalf of the District of Columbia and was rejected by the court, and to the refusal of the court to grant the said instruction the defendant then and there excepted, and the exception was noted upon the minutes of the court and duly allowed.

5. The jury are instructed that they are not at liberty to infer from the mere fact that the defendant is known as general superintendent of the United States Electric Lighting Company or 14 from the fact that he is a superior officer of the witness Bolton, if unaccompanied by evidence satisfactory to them, that he was in control of or participated in the operations of the plant causing the smoke described in the evidence, to find that he is the occupant of the said premises or to convict him in this case.

Which exception was objected to on behalf of the District of Columbia and was rejected by the court, and to the refusal of the court to grant the said instructions the defendant then and there excepted, and the exception was noted upon the minutes of the court and duly allowed.

And thereupon the court, at the request of the defendant, charged the jury as follows:

6. The jury are instructed that before they can convict the defendant they must be satisfied beyond a reasonable doubt that he is guilty of the offence charged. If, upon the whole evidence in the case, they entertain a reasonable doubt whether he was an occupant of the building from which smoke was emitted, as charged, or whether he had an agency in the control of the furnace or of the engineer or other persons who operated the same at the time mentioned in the information, then it is their duty to render a verdict in his favor.

All the foregoing exceptions were duly taken before the jury retired and were duly noted by the court on its minutes at the time the same were severally taken.

Thereupon, after the jury had retired, they requested to be allowed to return to the court and receive further instructions; which request being granted, the jury prayed the court to instruct them upon the following question:

"According to the information, if we find that there is no smoke-

stack attached to the building No. 213 14th street N. W., then should our verdict be not guilty?"

Whereupon the following proceedings ensued:

The COURT: The instructions I have given you, gentlemen, I think, cover the very question.

(Reading:) "The jury are instructed that if they find from the evidence that the defendant at the time charged in the information had an agency in the control of the furnace at the premises mentioned in the information and in the evidence, then he was an occupant of said premises and building within the meaning of the act of Congress under which he is now proceeded against."

The FOREMAN: But the information says 213, your honor.

The COURT (continuing): "The jury are instructed, fourth, that if they find from the evidence that the defendant was the superintendent of the owner of said building mentioned in the information and had control of the furnace or of the engineer or other persons, if any, who operated the same at the time mentioned in the information, then the defendant is an occupant of said building within the meaning of the act of Congress under which he is now proceeded against."

The FOREMAN: But that also says 213 in the information.

15 The COURT: Yes; the instruction covers the building mentioned in the information.

Mr. DARLINGTON: That is 213.

Mr. THOMAS: Mr. Darlington presented to your honor a prayer to take the case from the jury on the ground that on No. 213 there was not a smokestack. The whole point is whether this building, No. 213, is connected with that plant, and not whether there is a smokestack or chimney on the identical piece of property, No. 213, but at that place—the premises comprised in that number—the whole premises.

Mr. DARLINGTON: You mean independently of 213?

Mr. THOMAS: His illustration was that the city post-office building was not connected with the Post-office, and that this building was not connected with that (indicating the one to the east of the court room). My reply to that was that it was a description of the whole premises and connected together. Therefore, I submit, the question ought to be answered "No," unless they find that the building was not connected with the plant.

Mr. DARLINGTON: If the court please, we are there charged with causing smoke to issue from a chimney connected with part of premises No. 213 14th street N. W. Your honor referred to the jury the question whether or not No. 213 14th street was the building with which the chimney was connected and from which the smoke issued. Now, the jury ask you a very plain question. They say, If we find that the smokestack is not connected to No. 213 14th street should our verdict be not guilty? Is any court in the world to say that a man may be indicted or informed against for occupancy of and causing smoke to issue from one building and be convicted for oc-

cupancy of and causing smoke to issue from another and different building?

The COURT: Gentlemen of the jury, you are the judges of the fact, from the evidence before you, whether the building 213 is a part of the general building in which this power is made and from which the smoke escapes through this smokestack. You have the evidence. It is not for me to say whether the gate which connects 213 with the other premises connects it. You are the judges of the fact, and that is a question of fact for you to determine, and it is for you to determine whether the building from which this smoke is emitted is the building described in the information, having thereto attached the smokestack, furnace, steam boiler, and a stationary engine for some kind of work. 213 is named in the information, but the evidence is before you to determine whether the smokestack is connected with the premises, the emission from which of such smoke violates the law in making the nuisance. That is my understanding of it, and the testimony is before you to determine whether they are the same building or not.

The FOREMAN: We will be unable to agree unless your honor gives us a decided answer. It is very hard for us to agree.

The COURT: I am not here to determine whether 213, 17, 16 19, is either one or two or more buildings. You have the facts. I might illustrate. In the city of New York and elsewhere they have power, where the power is created by a stationary engine, steam boiler, and a furnace, the smoke passing through a smokestack which need not be within half a mile of where the power is applied. The power is distributed over the city, and the smokestack may not be connected with or be anywhere near the place where the power is applied, and I think that is an illustration you may use.

Mr. DARLINGTON: We object to that illustration and except to it. The jury do not ask your honor to determine whether 213 is the building from which the smoke issues. Their inquiry is, "If they find that that smokestack is no part of building No. 213, should they acquit the defendant?"

Which exception to the court's said illustration was noted upon the minutes of the court and duly allowed.

Mr. THOMAS: I submit, if the question is answered categorically, the answer should be no.

The COURT: I will say to you, gentlemen, in the light of all the evidence and the instructions, I should say no.

Mr. DARLINGTON: And we except to that.

The COURT: Yes, in the light of all the evidence and instructions, I say no.

Which exception to the court's reply to the request of the jury for further information was noted upon the minutes of the court and duly allowed.

Whereupon the jury retired, and upon returning to the court-room rendered a verdict of guilty.

The defendant, in connection with and at the time of each of the

exceptions by him taken to the rulings of the court in the case, set out in this bill of exceptions, gave notice of his intention to apply for a writ of error, and each of his said exceptions, together with his several notices of intention to apply for a writ of error, were duly noted upon the minutes of the court, and the defendant presented this his bill of exceptions to the court for signature within three days thereafter, namely, on the 28th day of March, 1902.

The foregoing exceptions are signed as the several exceptions taken at the trial of the above-named cause this 17th day of April, A. D. 1902, *nunc pro tunc*, and within two days after said sentence.

CHARLES F. SCOTT. [SEAL.]

This bill is approved as a correct summary of evidence and rulings.

E. H. THOMAS, *For D. C.*
J. J. DARLINGTON,
Attorney for Defendant.

17 In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss*:

I, Joseph Y. Potts, clerk of the police court of the District of Columbia, do hereby certify *that* the foregoing pages, numbered from 1 to 25 inclusive, to be true copies of originals in cause No. 218,083, wherein The District of Columbia is plaintiff and Lindley E. Sinclair defendant, as the same remain upon the files and records of said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, — the city of Washington, in said District, this 8th day — May, A. D. 1902.

JOSEPH Y. POTTS,
Clerk Police Court, Dist. of Columbia.

Endorsed on cover: District of Columbia police court. No. 1218. Lindley E. Sinclair, plaintiff in error, *vs.* The District of Columbia. Court of Appeals, District of Columbia. Filed May 9, 1902. Robert Willett, clerk.

18 WEDNESDAY, *June 4th, A. D.* 1902.

LINDLEY E. SINCLAIR, Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA. } No. 1218.

The argument in the above entitled cause was commenced by Mr. J. J. Darlington, attorney for the plaintiff in error, and was continued by Mr. E. H. Thomas, attorney for the defendant in error.

THURSDAY, *June 5th, A. D.* 1902.

LINDLEY E. SINCLAIR, Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA. } No. 1218.

The argument in the above entitled cause was continued by Mr. E. H. Thomas attorney for the defendant in error and was concluded by Mr. J. J. Darlington attorney for the plaintiff in error.

19 LINDLEY E. SINCLAIR, Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA. } No. 1218.

(Mr. Justice SHEPARD delivered the opinion of the court.)

Like No. 1219, recently decided, this case comes before us on a writ of error to the police court of the District, in which the plaintiff in error, Lindley E. Sinclair, was convicted of the violation, on February 11, 1902, of what is commonly called the "smoke law" enacted by Congress for the District of Columbia.

The only difference between this case and No. 1219, aforesaid, is in the form of the information.

This, in the case at bar, contains but one count, which charges, that the defendant in the city of Washington, District of Columbia, on February 11, 1902, "being then and there the occupant of a certain building, to wit, the building situated at No. 213, 14th street north west, in the city aforesaid, in the District of Columbia, to which said building there is attached a smoke stack and chimney used in connection with a certain steam boiler, and furnace in said building, the said Lindley E. Sinclair, as such occupant, did then and there unlawfully cause, permit and allow the emission into the open air" &c. &c. &c.

In the preceding case, (No. 1219), upon evidence substantially similar in respect of the description of the premises where the business of the United States Electric Lighting Company is carried on, under the general superintendence of the defendant, it was held that the defendant, as such general superintendent of the company, was rightly charged as occupant and agent of the building to which the smoke-stack was directly attached, because, among other grounds, each contiguous house upon the same premises used in carrying on the business of the defendant's principal must be regarded as included in one general building.

20 The information in No. 1219 did not undertake to describe the building by particular number, as is the condition in the case at bar.

That the particular description of the building by street number was wholly unnecessary there can be no doubt.

Assuming it to be true, then, as contended on behalf of the plaintiff in error, that the evidence fails to show that the smoke stack,

from which the prohibited smoke was emitted, was attached to the particular one of the contiguous houses known as No. 213, 14th street, the question arises, whether the prosecution was bound by the particular description as alleged.

We are of the opinion that it was not. The street number of the building was not an ingredient of the offence. It was not essential by way of identification—and could have been omitted without affecting the charge of the offence in any respect whatever. Being mere harmless surplusage it could be disregarded in evidence even if not alleged under a *videlicet*. U. S. *v.* Sumner 3 Story 12, 13; U. S. *v.* Vickery (U. S. C. C. Md.) 1 H. & J. 427; Rawlings *v.* State 2 Md. 201, 212; Henderson *v.* State 105 Ala. 82, 85; McConnell *v.* State 22 Tex. Ct. App. (Cr.) 354, 368; State *v.* Hecht 23 Minn. 549.

The allegation of the particular number, however, was made under a *videlicet*, as shown in the extract from the information heretofore given.

It is true that the *videlicet* would not have the effect to relieve the pleader from proof if the fact so alleged be necessary to the description of the identity of that with which it is connected. But when the particular allegation, descriptive of time, place, &c., is not so essential, its statement under the *videlicet* clearly indicates that the pleader has not undertaken to prove the precise facts and circumstances so alleged, and he will not be held to them. 1 Greenleaf Ev. sec. 60; State *v.* Hecht 23 Minn. 549.

All other questions in the case having been disposed of by
21 the decision in No. 1219, the judgment will be affirmed with costs; and it is so ordered.

Affirmed.

22 MONDAY, *June 23d, A. D.* 1902.

LINDLEY E. SINCLAIR, Plaintiff in Error, *vs.* THE DISTRICT OF COLUMBIA. } No. 1218. April Term, 1902.

In error to the police court of the District of Columbia.

This cause came on to be heard on the transcript of record from the police court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said police court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

June 23, 1902.

23 TUESDAY, *June 24th, A. D.* 1902.

LINDLEY E. SINCLAIR, Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA. } No. 1218.

On motion of Mr. C. C. Cole of counsel for the plaintiff in error, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond is fixed at the sum of two hundred and fifty dollars.

24 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Lindley E. Sinclair, plaintiff in error, and The District of Columbia, defendant in error a manifest error hath happened, to the great damage of the said plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of June, in the year of our Lord one thousand nine hundred and two.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

25 (*Bond on Writ of Error.*)

Know all men by these presents, that we, Lindley E. Sinclair as principal, and Geo. H. Harries, as surety, are held and firmly bound unto the District of Columbia in the full and just sum of two hundred and fifty dollars to be paid to the said District of Columbia, its certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of June, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between the said Lindley E. Sinclair and the said The District of Columbia number twelve hundred and eighteen (1218) a judgment was rendered against the said Lindley E. Sinclair and the said Lindley E. Sinclair having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The District of Columbia citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Lindley E. Sinclair shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

L. E. SINCLAIR. [SEAL.]
GEO. H. HARRIES. [SEAL.]

Sealed and delivered in the presence of—
C. C. COLE.

Approved by—
R. H. ALVEY,
Chief Justice Court of Appeals
of the District of Columbia.

O. K.
A. B. D.

[Endorsed:] No. 1218. Lindley E. Sinclair plaintiff in error, *vs.* The District of Columbia. Bond on writ of error to Supreme Court, U. S. Court of Appeals District of Columbia. Filed Jul- 11, 1902. Robert Willett, clerk.

26 UNITED STATES OF AMERICA, *ss:*

To the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Lindley E. Sinclair is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 11th day of July, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted July 11, 1902.

A. B. DUVALL, *Att'y D. C.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Jul- 11, 1902. Robert Willett, clerk.

27 Court of Appeals of the District of Columbia.

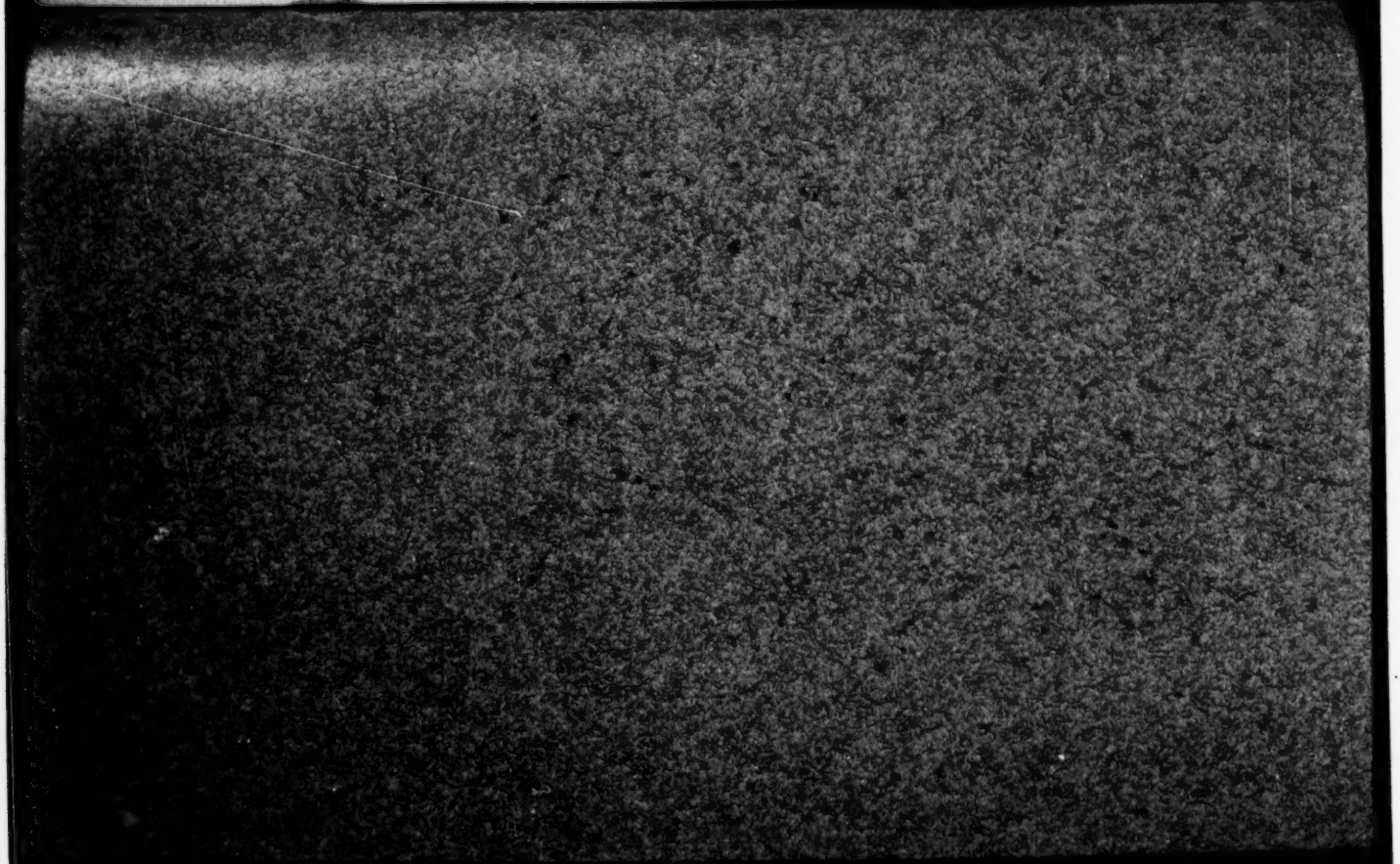
I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 26 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Lindley E. Sinclair plaintiff in error *vs.* The District of Columbia No. 1218, April term, 1902, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 11th day of July A. D. 1902.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,617. District of Columbia Court of Appeals. Term No. 94. Lindley E. Sinclair, plaintiff in error, *vs.* The District of Columbia. Filed July 22nd, 1902.



Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 94.

LINDLEY E. SINCLAIR, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

Upon a Writ of Error to the Court of Appeals of the District of Columbia.

Brief in Behalf of the Plaintiff in Error.

Statement.

This was a prosecution commenced in the Police Court of the District of Columbia charging the plaintiff in error with a misdemeanor in violating the provisions of an act of Congress against "the emission of dense or thick black or gray smoke or cinders," under certain circumstances. The act defining the law was passed on the 2d day of February, 1899, and is found in the 30th Statutes at Large, at page 812, and is in the following language:

> "Be it enacted, etc., That on and after six months from the passage of this act the emission of dense or thick black or gray smoke or cinders from any smoke-stack or chimney used in connection with any stationary engine, steam boiler, or furnace of any description within the District of Columbia shall be deemed, and is hereby declared, to be a public nuisance:
>
> "Provided, That nothing in this act shall be con-

strued as applied to chimneys of buildings used exclusively for private residences.

"SEC. 2. That the owner, agent, or lessee, or occupant of any building of any description, from the smokestack or chimney of which there shall issue or be emitted thick or dense black or gray smoke or cinders within the District of Columbia on or after the day above named shall be deemed and held guilty of creating a public nuisance and of violating the provisions of this act.

"SEC. 3. That any person or persons violating the provisions of this act shall, upon conviction thereof before the Police Court of the District of Columbia, be punished by a fine of not less than ten dollars nor more than one hundred dollars for each and every offense; and each and every day wherein the provisions of this act shall be violated shall constitute a separate offense.

"SEC. 4. That in order to provide for the enforcement of the provisions of this act there shall be detailed from time to time by the Commissioners of the District of Columbia an inspector or inspectors of the health department of the District of Columbia, whose duty it shall be, under the supervision of the health officer of the District of Columbia, to cause to be prosecuted all persons violating the provisions of this act.

"SEC. 5. That no discrimination shall be made against any method or device which may be used for the prevention of smoke and which accomplishes the purpose of this act.

"SEC. 6. That all acts or parts of acts inconsistent herewith be, and the same are, hereby repealed."

The information charged the plaintiff in error with being the occupant of the building situated at No. 213 Fourteenth street northwest, to which there was alleged to be attached a smokestack and chimney, and with permitting the emission from said smokestack and chimney of thick or dense black and gray smoke on a day certain stated in said information (Rec. p. 1). To this information the defendant entered a plea

"not guilty," and a jury trial was had resulting in a verdict of "guilty," and sentence to pay a fine of $50, or in default to be committed to the workhouse for a term of ninety days (Rec. p. 3).

At the trial certain exceptions were taken to the rulings of the court.

The evidence on behalf of the District tended to prove that on the 11th day of February, 1902, smoke of the character mentioned in the act was emitted from the smokestack in question for the space of 15 minutes between 10 o'clock and 48 minutes in the morning and 1 o'clock and 20 minutes in the afternoon, as follows: From 10.48 to 10.52; from 11.10 to 11.12; from 11.26 to 11.30 a. m., and from 1.15 to 1.20 p. m., and that the smoke came from a chimney which is attached to thirteen furnaces and boilers and eight stationary engines in the plant of the United States Electric Lighting Company; that the defendant had an office in the building No. 213 Fourteenth street northwest, mentioned in the information, and that over the door of his office was the sign "Office of the General Superintendent;" that the plaintiff in error was the general superintendent of the said United States Electric Lighting Company, and occupied the office over which the sign was placed; that one Henry S. Bolton was the engineer in charge of the electric lighting company's plant, who employed the men who attended to the furnaces, and had charge of them and the furnaces and engines; and that the plaintiff in error was his superior officer. And thereupon the witness Bolton, called as a witness by the District, was asked to whom he made reports, to which question counsel for the plaintiff in error objected on the ground that the reports were in writing and should be produced, but the court overruled the objection, to which the plaintiff in error excepted (Rec. p. 6). And the witness thereupon testified that he made reports, both written and verbal, to the plaintiff in error. He further testified that said Sinclair took no active part in the running or the con-

trol of the plant; that he received orders from Sinclair from time to time, but could not tell in relation to what particular matter; that Sinclair made the contract of employment with him but he was paid by the company; that witness did not know who purchased the coal. Witness was then asked what kind of coal was used at the plant, and answered that bituminous coal was used. It also appeared from the testimony of the witness Bolton that the smokestack is not upon or connected with the building No. 213 Fourteenth street, but upon the adjoining premises known as the United States Electric Lighting Company's plant, and that there is an alley between that building and the plant; that supplies for the power plant are taken in through the alley, which is about eighteen feet wide; that he did not remember to have received any order from plaintiff in error in any manner concerning the fires or running of the furnaces, boilers, or engines; that the power station fronts about one hundred and twenty feet on Fourteenth street and two hundred and twenty feet on B street, and that it does not include No. 213 Fourteenth street northwest; that the machinery and smokestack are in the building on the last-mentioned place and not in 213 Fourteenth street northwest; that there is a wall at the rear of premises No. 213 Fourteenth street that runs across the alley and connects with the wall of the building containing the machinery; and that the plaintiff in error had no office or desk in the building that contains the machinery. The evidence on behalf of the plaintiff in error tended to show that he was not elected by the stockholders or directors, but was appointed by one of the general officers of the electric lighting company, either the treasurer or vice-president, and the manner of his appointment was the same as that of linemen, motormen, and other employees of the company; that the power plant containing the machinery and smokestack was in a building entirely separate from No. 213 Fourteenth street; that there are no numbers on the build-

ings containing the machinery and smokestack; that 217, 219, and 221 Fourteenth street are used as storehouses by the United States Electric Lighting Company and the Potomac Electric Power Company; that the officers of the United States Electric Lighting Company are a president, vice-president, treasurer, secretary, and general manager, and that the plaintiff in error did not hold any of those offices.

Thereupon the plaintiff in error introduced as witness John T. Sullivan, who testified that he was a steam engineer by occupation, and that he had had ten years' experience in operating furnaces and plants for the production of electricity, either for lighting or for motive power; whereupon counsel for plaintiff in error put the following question to the witness:

> "What can you tell us as to the possibility of conducting or operating a plant which will produce power for lighting purposes without the emission at times of dense gray or black smoke?"

To this question counsel for the prosecution objected; whereupon counsel for the defendant stated:

> "The point I propose is this: This company, under the express or implied license of Congress, or both, has expended a very large amount of money in establishing a plant here in the District of Columbia. It is charged with great public duties. The lighting of the streets of the city is a part of its duty, in addition to the illumination of public and private residences and business houses. It is under a legal obligation to perform this work. It would be liable in damages if it refused. The point that I wish to make is that any act, especially an act passed after a company has been authorized and directed to expend large sums of money in installing costly and important public improvements, which deprives it of the power of using its property, an act which disables it from performing a public duty for the neglect of which or the failure to perform which it

would be liable in damages, would be an unconstitutional act; and if we can prove to the satisfaction of the jury that the emission of such smoke, under such circumstances, as is shown in this case, is absolutely indispensable to the company's enjoyment of its property, and to the performance of its public duties, which it is obliged to perform, then to that extent the act would be unconstitutional. We offer this testimony in that connection, and we offer to prove the facts to which we refer."

But the court sustained the objection and excluded the testimony, to which ruling counsel for the plaintiff in error excepted (Rec. pp. 11 and 12).

After the close of the evidence, counsel for the plaintiff in error requested the court to instruct the jury to return a verdict for the defendant, and also that there was no evidence from which the jury could find that he was an occupant of the premises mentioned in the information; that the jury should acquit unless they believed from the evidence that he was an occupant of the building from the smoke-stack of which the smoke was emitted; that they must acquit unless they find he participated in or controlled the use of the furnaces, boilers, or stationary engines; that the jury would not be justified in finding that the plaintiff in error was an occupant of the said premises merely upon the fact that he was known as general superintendent of the Electric Lighting Company, or the superior officer of the witness Bolton, without evidence to show his participation in or control over the furnaces, etc.; but the court refused to give any of the said instructions, and the counsel for the plaintiff in error excepted to such ruling severally. The court, at the request of the counsel for the prosecution, instructed the jury that the emission of smoke as described in the information was a public nuisance; that if they found the plaintiff in error had an agency or control of the furnaces at the premises mentioned in the information, he was an occupant of the building; that if he was the superin-

tendent of the owner and had control of the furnaces, or engineer, or other persons who operated the same, then he was an occupant; that if he was the superintendent of the building situated at Fourteenth and B streets northwest, in the city of Washington, District of Columbia, described in the information as 213 Fourteenth street northwest, and known as the plant of the United States Electric Lighting Company, then in contemplation of law he was the occupant of said building, the counsel for the plaintiff in error objecting and excepting to the granting to each of said instructions on behalf of the prosecution (Rec. pp. 12, 13, and 14). The jury, after retiring, having come in for further instruction, inquired of the court whether, if they should find that there was no smokestack attached to the building described in the information, their verdict should be not guilty. To this simple question the court's answer, at first, was simply the reading of the third and fourth instructions, granted on behalf of the District, which instructions, as will be noticed, endeavored to blend together the premises "mentioned in the *information and evidence*" (Rec. pp. 14 and 15). This was followed by a suggestion, in effect, from the court, that the gate which formed a part of the fence between the buildings might be treated as connecting them. Thereupon, the jury asking for something more specific, the court, under the objection of the plaintiff in error and subject to his exception, told them that in New York and other places—

> "the power is created by a stationary engine, steam boiler and a furnace, the smoke passing through a smokestack, which need not be within half a mile of where the power is applied—that the power was distributed over the city, and that the smokestack might not be connected with or be anywhere near where the power is applied, and I think that is an illustration you may use."

Thereupon, the District not being satisfied, even with this, the court instructed the jury, subject to exception by the

plaintiff in error, that, if they should find there was no smokestack attached to the building No. 213 Fourteenth street northwest, the only premises of which the plaintiff in error was charged in the information with being an occupant, or from which he was charged with causing smoke to issue, still they could not acquit.

After a verdict of "guilty," and judgment, plaintiff in error obtained a writ of error to the Court of Appeals of the District, which last-mentioned court affirmed the judgment of the Police Court (see Rec. pp. 17 and 19 for opinion and judgment of the court).

Thereupon the plaintiff in error sued out a writ of error from this court to the Court of Appeals.

Assignment of Errors.

The court below erred in sustaining the Police Court in the following particulars:

1. In holding that the act for the prevention of smoke in the District of Columbia, and for other purposes, approved February 2, 1893, was constitutional.

2. In refusing to instruct the jury upon the whole evidence to acquit the plaintiff in error.

3. In excluding the evidence on behalf of the plaintiff in error that such emissions of smoke as were shown in the evidence were indispensable to the use or enjoyment of the power plant, and that the prohibition thereof was a taking of said property.

4. In instructing the jury that the smoke mentioned in the information and shown by the evidence was a public nuisance.

5. In instructing the jury that they could find the plaintiff in error guilty, though they should find as a fact that smoke was not produced in or emitted from premises No. 213 Fourteenth street.

6. In informing the jury that, in New York and elsewhere, power is created by engines, boilers, or furnaces, the

smoke of which passes through a smokestack, which need not be within half a mile from where the power is applied, or connected with or anywhere near such place, and that this was an illustration which they might use in passing upon the guilt or innocence of the plaintiff in error.

Jurisdiction.

Counsel for plaintiff in error have been verbally notified by counsel for the defendant in error that a motion to dismiss will be submitted with their argument on the merits on the ground that the court has no jurisdiction in this case.

The court has jurisdiction upon the ground that the validity of a statute or an authority exercised under the United States is drawn in question. The jurisdiction of this court over cases adjudicated in the Court of Appeals of the District of Columbia is regulated by section 233 of the Code of the District, which is as follows:

> "SEC. 233. Any final judgment or decree of the Court of Appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

This is the same language as that contained in section 8 of the organic act of the Court of Appeals passed February 9, 1893 (27 Stats. at Large, at page 434), and the same law was in force prior to that time regulating appeals from the Supreme Court of the District of Columbia to this court.

This court has determined that it has jurisdiction in all cases where the validity of such statutes or authority is drawn in question.

> Parsons *vs.* District of Columbia, 170 U. S. 45.
> Capital Traction Co. *vs.* Hof, 174 U. S. 1.

One of the questions in the Parsons case was whether the Commissioners of the District of Columbia had power and authority to assess upon abutting property the expenses of laying water mains. The proceeding in the Supreme Court of the District of Columbia was by *certiorari* to remove the proceedings of the Commissioners making such an assessment into that court and have the same quashed. The fifth ground assigned in Parsons' petition for quashing the same was:

> "5. The assessment was made without authority of law, and the respondents had no jurisdiction or right to make the same" (see 170 U. S., p. 46).

The questions at issue in that case were stated in the opinion of this court (see 170 U. S., p. 50) as follows:

> "It is stated in the opinion of the Court of Appeals that the questions raised in that court were three: 1st. Whether the act of the legislative assembly of the District of Columbia, approved June 23, 1873, in reference to the construction of water mains, and providing the mode of assessment therefor, and also the act of Congress of August 11, 1894, 'to regulate water-main assessments in the District of Columbia' are constitutional and valid enactments; 2d. Whether in the assessment there was a sufficient description of the appellant's property; 3d. Whether there was sufficient notice of the assessment given to the appellant. Those questions are clearly within terms of the statute authorizing this court to review the final judgments or decrees of the Court of Appeals."

In Hof *vs.* Capital Traction Co., this court said:

> "The petition for a writ of certiorari presents for determination a serious and important question of

> the validity, as well as the interpretation and effect of the legislation of Congress conferring upon justices of the peace in the District of Columbia jurisdiction in civil actions in which the matter in dispute exceeds twenty dollars in value, and providing for a trial by a jury before the justice of the peace, an appeal from his judgment to the Supreme Court of the District of Columbia, and a trial by a jury at the request of either party, in the appellate court. This court, therefore, has jurisdiction of the writ of error. Baltimore and Potomac Railroad *vs.* Hopkins, 130 U. S. 210, 224; Parsons *vs.* District of Columbia, 170 U. S. 45."

In the present case "the validity as well as the interpretation and effect of the legislation of Congress" is involved, as it was in the Hof and Parsons cases. This case is unlike the cases of the B & P. R. R. Co. *vs.* Hopkins, 130 U. S. 210; District of Columbia *vs.* Gannon, 130 U. S. 227; United States *vs.* Lynch, 137 U. S. 280; South Carolina *vs.* Seymour, 153 U. S. 353, and other like cases where jurisdiction was denied because the questions involved only the construction, and not the validity of the statutes or powers.

The question of the constitutionality of the law was made in the Police Court, both by asking an instruction for a verdict for the plaintiff in error, and by assigning it as one of the grounds of the motion for a new trial (see Rec. pp. 4 and 13). The assignment of the unconstitutionality of the law as one of the grounds in support of the motion for a new trial is in itself a sufficient making of that question in the record to give this court jurisdiction, as was held in the case of the St. Louis Coal Company *vs.* Illinois, 185 U. S. 203, where the question was made for the first time upon motion in arrest of judgment. The court in that case on pages 206–7 of the report said:

> "While the constitutionality of the law was not specially set up and claimed before the trial in the Circuit Court, there was a motion made in arrest of

> judgment, in which the invalidity of the statute was specially set up upon the ground of its repugnancy to the Fourteenth Amendment to the Constitution. The motion was denied, although the Supreme Court did not in terms pass upon the Federal constitutionality of the law. But this was a sufficient presentation of the Federal question."

The court below said nothing in its opinion in this case about the constitutionality of the law, for the reason that it had fully considered and determined that question in the two previous cases of Moses *vs.* The United States, 16th App. Cases D. C. 428, and Bradley *vs.* the District of Columbia, 20th App. Cases D. C. 169.

The Act of Congress is Unconstitutional.

The act of Congress under consideration in this case is invalid, because its enforcement has the effect of taking private property for public use without just compensation, and of depriving persons of their liberty and property without due process of law, and denies to them the equal protection of the law.

The first section declares—

> "*the emission of dense or thick, black or gray smoke or cinders from any smokestack or chimney used in connection with any stationary engine, steam boiler, or furnace of any description within the District of Columbia,*"

to be a public nuisance, but expressly excepts from the operation of the act buildings used exclusively for private residences, and by implication also excepts from its operation locomotive engines and steamboats. Whether the smoke is a public nuisance is not made to depend at all upon the locality of the smokestack, or the proximity thereto of other buildings or residences. The emission of smoke at some isolated place within the city limits, or in the country miles away from any residences, is declared to be a public nuisance

equally with the smoke produced in thickly-populated localities. If the smoke be produced by a stationary engine, steam boiler, or furnace, situated in any building other than a private residence, it is declared to be a public nuisance, while if the same character and quantity of smoke, and for the same or greater periods of time, be produced from a private residence, it is not so declared. If the smoke be produced from a locomotive engine or a steamboat it is not a public nuisance. So that, under the act, the owner of steamboats and locomotive engines may produce the same kind, character, and quantity of smoke, in the same localities that the stationary engine does, and be innocent, while if the owner or occupier of a building having a stationary engine, steam boiler, or furnace produces it, he is guilty of an offense and liable to punishment.

It is also apparent that, under the operation of the act, two buildings might be standing side by side, one a private residence, the other an apartment house or office building, and the smokestack or chimney of each emitting the same kind and character of smoke, produced by the same kind or character of machinery or apparatus, and the owner of the one be guilty of an offense under the law, while the other would be innocent. Nor does the quantity or the length of time of the emission of the smoke affect the question. If it be emitted from a smokestack connected with a stationary engine, steam boiler, or furnace, for ever so short a time and in ever so small a quantity, it is declared to be a public nuisance and punishable.

It may be admitted that the regulation of the production of smoke in thickly-settled localities is within the police power, and Congress may legislate thereon for the District of Columbia so long as its enactments are reasonable, but the present act is an unequal, offensive, and unreasonable exercise of the police power. That the courts have the power in such cases to declare the statute invalid is well settled.

Mugler *vs.* Kansas, 123 U. S. 623.

Lawton *vs.* Steele, 152 U. S. 133.

In the case of Mugler *vs.* Kansas, this court said at page 661 of the report:

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no *real or substantial* relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." . . .
>
> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In the case of Lawton *vs.* Steele the court said:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon the individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or interpose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts" (page 137). . . .

And the same doctrine has been repeated in many subsequent cases in this court.

The Fifth Amendment to the Constitution affords to the

citizens of the District of Columbia the same protection that the Fourteenth Amendment does to the citizens of the States against legislation of this character.

Callan *vs.* Wilson, 127 U. S. 540.
Brown *vs.* New Jersey, 175 U. S. 172.

And, besides, legislation in violation of the rights of liberty, property, and equality is unreasonable and void regardless of any express constitutional provision.

Loan Asso. *vs.* Topeka, 20 Wallace, 655.
Cooley's Constitutional Limitations, 3d ed. 391.
1st Dillon on Mun. Cor., 322.
Tiedman on Limitation on Police Power, pp. 197–198.

In Loan Association *vs.* Topeka, speaking upon this subject, this court said:

> "There are limitations of such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Judge Cooley says in his work, above referred to, on page 391:

> "But everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plough' (Locke on Civil Gov't, 142). This is a maxim in constitutional law, and by it we

may test the authority and binding force of legislative enactments. . . .

"The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specific lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to 'their pursuit of happiness;' and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived." . . .

The court below understands this to be the rule as shown by its opinion in the case of Moses *vs.* United States, in which it held this law constitutional. In that case the court said (16 Ap. D. C. 433):

"The power of Congress to enact regulations affecting the public peace, morals, safety, health, and comfort, within the District of Columbia, is the same as that of the several State legislatures within their respective territorial limits. It is no less nor can it be greater; for all of the guaranties of the Constitution respecting life, liberty, and property are equally for

the protection and benefit of all citizens residing in the District of Columbia, as those residing in the several States. Callan *vs.* Wilson, 127 U. S. 640; United States, ex rel. Kerr *vs.* Ross, 5 App. D. C. 241–247–248; Lansburgh *vs.* Dist. of Col., 11 App. D. C. 512, 521; Stoutenburgh *vs.* Frazier, ante p. 229."

Judge Dillon, in 1 Dill. Mun. Cor., sec. 322, above referred to, says:

"As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect can not be sustained. Special and unwarranted discrimination, or unjust or oppressive interference in particular cases, is not to be allowed." . . .

"The by-laws of a municipality, whether they purport to regulate callings or otherwise, must, as indeed must every law, preserve equality of right. Those exercising the same privilege must be treated alike. The door must be closed to none by discrimination, if we would avoid monopoly and wrong. This principle is as necessary to sound legislation as the circulation of the blood is to the human system, or the flow of tide water to the ocean. It has produced a line of decisions which are universally regarded as sound by the courts of the country." . . .

In Tiedeman on Limitations of Police Power it is said:

"We deny that the legislature can enlarge its power over property or pursuits by declaring them nuisances, or by enacting a definition of a nuisance that will cover them. Whatever it has a right by the the Constitution to prohibit or to confiscate, it may thus deal with, without first declaring the matter to be a nuisance; and whatever it has not a right by the Constitution to prohibit and confiscate, it can not thus deal with, even though it first declare it a nuisance. It is also a judicial question whether the police regulation extends beyond the threatened evil and prohibits that which involves no threatening danger to the public. If it is unconstitutional to

impose police regulations upon an innocent calling, it must be likewise unconstitutional to place an occupation under police restraint beyond what is necessary to *dissipate the threatening evil*. The legislature has the choice of means to prevent evil to the public, but the means chosen must not go beyond the prevention of the evil, and prohibit what does not cause the evil." . . .

"And it is a judicial question whether a particular regulation is a reasonable exercise of police power. The public necessity of the exercise of the police power in any case is a matter addressed to the discretion of the legislature, but whether a given regulation is a reasonable restriction upon personal right is a judicial question."

In the case of Simrall *vs.* the City of Covington, 90 Ky. 444, it is said:

"Perhaps the most distinguishing feature of the common law is its regard for the protection and equality of individual right. It is a rule, therefore, that where the by-law of a municipality, enacted under a general grant of power or by virtue of its incidental authority, is unfair and partial in its operation, it will be declared void. It will not be upheld if it be unreasonable and oppressive. It must not contravene common right or the general law of the State, or make unwarranted or special discriminations." . . .

The act of Congress in question is not only void as being unreasonable and in restraint of the right to make reasonable use of property, but also as denying to the classes included in it the equal protection of the law, as is apparent from many decisions of this court.

Yick Wo *vs.* Hopkins, 118 U. S. 356.
Gulf, Colorado & S. F. Ry. *vs.* Ellis, 165 U. S. 150.
Lake Shore, etc., R. R. Co. *vs.* Smith, 173 U. S. 684.
Cotting *vs.* Kansas City Stock Yards Co., 183 U. S. 79.
Connolly *vs.* The Union Sewer Pipe Co., 184 U. S. 540.
Billings *vs.* Illinois, 188 U. S. 97.

In the case of Yick Wo *vs.* Hopkins, an ordinance of the city of San Francisco capable of being so administered as to discriminate against Chinese laundries was held to be invalid.

In the opinion of the court in that case, at page 369, it is said:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declarations of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." . . .

In the case of Gulf, Colorado and Santa Fe Railway *vs.* Ellis, the act of the legislature which provided for the recovery of an attorney's fee on behalf of the plaintiff in certain classes of actions against railroad companies was held to be invalid as discriminating legislation. In speaking of the right of the legislature to discriminate, and the limitation of such right, the court said:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining State action" (p. 154). . . .
>
> "That (classification) must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis" (p. 155). . . .

Quoting from the case of State *vs.* Loomis, 115 Mo. 307–314, the court says:

> "The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be incompetent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land" (p. 155).

This court continues, at page 160:

> "No duty rests more imperatively upon the courts than the enforcement of these constitutional provisions intended to secure that equality of rights which is the foundation of free government." . . .

In Lake Shore, etc., R. R. Co. *vs.* Smith, the court held that an act of the legislature of Michigan requiring the railroad company to sell one thousand mile tickets, good for two years, at certain prices to any one who desired to purchase them, good for the purchaser or his family to use, was void as discriminating legislation.

In Cotting *vs.* Kansas City Stock Yards Company, the act regulated the charges to be made by such companies, but provided that it should apply only to companies doing a certain volume of business. The act was declared void as denying to the companies to which it applied the equal protection of the laws. The court said:

> "If the average daily receipts of a stock yard are more than one hundred head of cattle, or more than three hundred head of hogs, or more than three hundred head of sheep, it comes within the purview of this statute. If less than that amount, it is free from legislative restriction."
>
> "Accepting, however, the full force of the general language in which the statute is couched, it appears that a classification is attempted between stock yards doing a large and those doing a small business. The express and only basis of classification is the amount of business done by the two classes. . . .
>
> "In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered, but simply on the amount of the business which the party does." . . . (104.)

Quoting from the opinion of the court in the case of State *vs.* Hann, 61 Kansas, 146, this court said:

> "Equal protection of the laws means equal exemption with others of the same class from all charges and burdens of every kind. . . . A classification of the kind exempted makes a distinction between corporations identical in organization, capital, and all powers and priviliges conferred by law. It is arbitrary and wanting in reason. The act in question is class legislation of the most pronounced character." . . .

And again, on page 111, the court said:

> "But, while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing

> the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when, upon one of two parties engaged in the same kind of business and under the same conditions, burdens are cast which are not cast upon the other."
>
> . . . . . .
>
> "This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

In the case of Connolly *vs.* the Union Sewer Pipe Co., 184 U. S. 540, this court held the statute of Illinois void which made it a misdemeanor for persons or corporations to combine for the purpose of controlling prices or creating monopolies, but excepted from the operation of the act farmers and raisers of live stock. The opinion in this case examines many of the more important decisions of this court upon the question under consideration, and distinguishes between the legislative power of taxation and the police power, holding that the former is much more extensive than the latter.

In the course of the opinion it is said:

> "The State has undoubtedly the power, by appropriate legislation, to protect public morals, the public health and public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void." . . . (p. 558.)

After referring to the cases and stating the principles to be deduced from them, the court continues:

> "These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute all except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides, notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a State, and agriculturists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe.
>
> "The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.'"

After referring to the cases upon this subject, involving the power of taxation, and speaking of the breadth of such power of the legislature, the opinion proceeds:

> "But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it can not divide those engaged in trade into two classes, and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same

domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

. . . . . .

"We conclude this part of the discussion by saying that, to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices, for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary." . . .

The court also held in that case that, as it did not appear that the legislature would have enacted the law if it had supposed that an exemption was invalid, the whole statute was unconstitutional and void.

The later case of Billings *vs.* Illinois was an inheritance tax case, and the classification was held valid. This case serves to illustrate and emphasize the difference between the taxing power and the police power of the legislature. The rule upon the subject of classification was forcibly stated in that case, in the following language:

> "If the purpose is within the legal powers of the legislature, and the classification made has relation to that purpose (excludes no persons or objects that are affected by the purpose, includes all that are), logically speaking it will be appropriate; legally speaking, a law based upon it will have equality of operation." . . .

The case of Connolly *vs.* the Union Sewer Pipe Company would seem to be so much like the present case in principle that it is impossible to differentiate them. Why should a person owning an office building be held guilty of an offense for doing the same thing that his near neighbor does who occupies his building as a residence and is held innocent? Or why should the plaintiff in error be held guilty of a misdemeanor when the owners of steamboats or locomotive engines which pass near him and create a greater volume of smoke and of a more offensive character are innocent of any offense?

In this connection, the assignment of error to the effect that the court erred in refusing to admit evidence tending to prove that it was impossible for the plaintiff in error to comply with the law without abandoning or losing the use of his property may be considered. The evidence was clearly admissible. If there be facts or circumstances of which the court can not take judicial knowledge, tending to show that a legislative act passed in pursuance of the police power is unreasonable, or that the enforcement of it will have the effect of depriving a party of his liberty or property, or will be unduly burdensome, they may be shown by competent evidence.

Chicago, Mil. & S. P. R. R. Co. *vs.* Minnesota 134 U. S. 418.
Smythe *vs.* Ames, 169 U. S. 466.
Commonwealth *vs.* Parks, 155 Mass. 531.
Rideout *vs.* Knox, 148 Mass. ~~372~~ 368
Health Dept. *vs.* Rector, 145 N. Y. 32.

In discussing the validity of an ordinance requiring owners of houses to furnish them with Croton water, Mr. Justice Peckham used the following language in the case of Health Department *vs.* Rector:

> "As to the other objection, no one would contend that the amount of the expenditure which an act of this kind may cause, whether with or without a hearing, is within the absolute discretion of the legislature. It can not be claimed that it would have the right, even under the exercise of the police power, to command the doing of some act by the owner of property, and for the purpose of carrying out some provision of law, which act could only be performed by the expenditure of a large and unreasonable amount of money on the part of the owner. If such excessive demand were made, the act would without doubt violate the constitutional rights of the individual. The exaction must not alone be reasonable when compared with the amount of the work or the character of the improvement demanded. The improvement or work must in itself be a reasonable, proper, and fair exaction when considered with reference to the object to be attained. If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method or means adopted for the attainment of the main object were or were not an unreasonable demand upon the individual for the benefit of the public. Of this the courts must, within proper limits, be the judges."
>
> . . . . . .
>
> "The difference between what is and what is not reasonable frequently constitutes the dividing line between a valid and void enactment by the legislature in the exercise of its police power. In commenting on the difference of degree in any given case which would render an act valid or otherwise, Mr. Justice Holmes, in Rideout *vs.* Knox, speaking for the Supreme Court of Massachusetts, said: 'It may be said that the difference is only one of degree;

most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain (148 Mass. 368, 372).'"

Decisions of State Courts in Smoke Cases.

Some of the State courts have dealt with this question, and there is some contrariety of opinion amongst them upon the question of the validity of enactments similar to the one under consideration, though none of the others contain such sweeping provisions and discriminations as this. The following cases are referred to:

St. Paul *vs.* Gilfillan, 36 Minn. 298.
St. Louis *vs.* Hertzberg Packing Co., 141 Mo. 375.
State *vs.* Mott, 61 Md. 297.
Harmon *vs.* Chicago, 110 Ill. 400.
People *vs.* Boden, 86 Mich. 273.
Cleveland *vs.* Mahm, 5 Ohio N. P. 203.
Cincinnati *vs.* Miller, 29 Cin. Law Bulletin, 364.
Health Dept. of N. Y. City *vs.* Ebling Brewing Co. (municipal court), 78 N. Y. Supp. 11.
Dept. of Health of N. Y. City *vs.* Ebling Brewing Co. (municipal court), id. 13.

Cleveland *vs.* Mahm, was a prosecution in the Police Court of Cleveland under the following ordinance:

"That the emission of dense smoke from any chimney anywhere in the city, or from the smoke-stack of any boat, locomotive, or stationary engine or boiler, within the limits of the city of Cleveland, shall be deemed and is hereby declared to be a public nuisance, and the owner, lessee, engineer, fireman,

employee, or other person having charge or control of, or operating any boat, locomotive or stationary engine, or boiler, manufactory, building or premises, within the corporate limits of said city, who shall cause or permit dense smoke to issue from any smokestack or chimney thereof, or connected therewith, shall be deemed guilty of creating a public nuisance and shall be fined for first offense not less than $10.00 nor more than $50.00 and for each subsequent offense not less than $25.00 nor more than $100.00."

Held void because indefinite, vague, and beyond the power of the city council as being a prohibition instead of a regulation.

In Cincinnati *vs.* Miller a similar ordinance was held valid.

In the two cases in the 78 N. Y. Supp. the same ordinance was under consideration. It is as follows:

"Sec. 134. That the owners, lessees, tenants, and managers of every blacksmith or other shop, forge, coal yard, foundry, manufactory, and premises where any business is done, or in or upon which an engine or boilers are used, shall cause all ashes, cinders, rubbish, dirt, and refuse to be removed to some proper place, so that the same shall not accumulate at any of the above-mentioned premises, or in the appurtenances thereof, nor the same become filthy or offensive. Nor shall any owner, lessee, tenant, manager, engineer, fireman, or any other person cause or allow any smoke, cinders, dust, gas, steam, or offensive odor to escape or be discharged from any such building, place, or premises, and every furnace employed in the working of engines by steam, or in any mill, factory, printing house, dye factory, iron foundry, glass house, distillery, brew house, sugar refinery, bake house, gas works, or in any other buildings used for the purposes of trade or manufacture, shall be so constructed as to consume or burn the smoke arising therefrom."

It is said in one of the opinions that, though enacted by the board of health, it had subsequently received legislative

sanction. The parties were the same in both cases. In the first, Joseph, J., held the ordinance valid and imposed a fine on the defendant. In the second, Tierney, J., expressed doubt as to its validity, but decided that the proper construction of the ordinance was that the production of the smoke must be "*to the* detriment or annoyance of any (some) person," and discharged the defendant because the evidence showed only the emission of smoke. Upon this point Judge Tierney said:

> "The defendant's counsel urges that this ordinance, literally interpreted, goes beyond the power of the legislature, and is therefore void. I have grave doubts whether this may not be so, and, until the board of health, under the power granted by the charter (section 1172) adopts an ordinance whose literal meaning can be reasonably upheld, whether acts that violate its spirit can be reached by the courts unless they constitute a public nuisance."
>
> . . .
>
> "Whatever my personal views may be of the validity of this ordinance, I should hesitate to pronounce it void, because, after having received the approval of the legislature, some higher court than this should first pass on that question, and because this very point of the illegality of this section was raised by this defendant in another proceeding and passed upon adversely to its claim by another justice of this court." . . .

The case of People *vs.* Boden, 86 Mich. 273, was a prosecution under a smoke ordinance in the following language:

Section 1:

> "The emission from any chimney or smokestack within the city, of dense smoke, or smoke containing soot or other substance in sufficient quantity to permit the deposit of soot or other substance on any surface within the corporate limits of the city, shall be deemed and is hereby declared a public nuisance."

Section 2:

> "Any owner, agent, lessee, or manager of any building, boat, locomotive, or other structure in the

> city of Detroit, who shall cause or permit dense smoke, or smoke containing soot or other substance as above, to be emitted from such structure, or from any other place, which said soot or other substance shall damage the property or injure the health of any person, or shall especially annoy the public, shall, upon the complaint of any citizen or officer of the city, in case of special annoyance, be liable for each and every such offense to a fine of not less than ten dollars nor more than one hundred dollars, or to imprisonment in the House of Correction not less than ten days nor more than thirty days, or both such fine and imprisonment, in the discretion of the court. *Provided*, that the provisions of this ordinance shall not apply to buildings used exclusively for private residence or to steamboats."

A conviction under this ordinance was sustained by a majority of the court. As to the contention that the ordinance was void because it exempted steamboats and private residences from its operation, the court said :

> "Ordinances must not only be reasonable and within the power of the municipality to enact them under its charter, but must affect each member of the community alike. They should neither favor nor discriminate against any person or class of persons or any particular portions of the municipal territory. Their burdens and their benefits should rest equally upon all. It can not be said that this ordinance makes such a discrimination that the court should declare it invalid." . . .

The above quotation is all that is said in the opinion of the court upon that subject. Two judges dissented upon the ground as stated by them that the ordinance was unreasonable and made an unjust discrimination which the law ought not to permit.

The cases of St. Paul *vs.* Gilfillan, St. Louis *vs.* Hertzberg Co., and the State *vs.* Mott are referred to by the court below in its opinion in the case of Moses *vs.* United States (16 App.

Cas. D. C. 433), when the question of the constitutionality of this statute was first before that court, and it is there said that those cases involved the construction of powers delegated by the legislatures to municipal officers, and that they have no application to the exercise of the power by the legislature itself. It is submitted that these cases can not be so easily disposed of, and that, while, in each of those cases, the courts had under consideration the validity of a municipal ordinance, the principal reasons given by the courts for holding them invalid apply as well to the legislature as to the municipal authorities.

In the case of City of St. Paul *vs.* Gilfillan, the court said:

> "An ordinance was adopted and passed by the city council of St. Paul, February 16, 1886, declaring the emission of dense smoke from the smokestack of any boat or locomotive, or from any chimney, anywhere in the city, a public nuisance; and provided that the owner or occupant of any building who shall permit dense smoke to issue from the chimney of such building, within the corporate limits, shall be guilty of a misdemeanor, and shall be fined, etc."
>
> . . .
>
> "The emission of dense smoke from smokestacks or chimneys is not necessarily a public nuisance. Whether so or not would depend largely upon the locality and surroundings, but the ordinance makes no provision for a determination of the question upon the facts of any particular case."
>
> The ordinance was held void.

In the case of St. Louis *vs.* Hertzberg the court stated the ordinance as follows:

> "That ordinance provides that 'the emission into the open air of dense black or thick gray smoke within the corporate limits of the city of St. Louis' is hereby declared to be a nuisance, 'and the owners, occupants, managers, or agents of any establishment, locomotives, or premises from which dense black or thick gray smoke is emitted or discharged are made guilty of a misdemeanor and subject to a

> fine of not less than ten or more than fifty dollars. And each and every day wherein such smoke shall be emitted shall constitute a separate defense.'"

By its charter, the city of St. Louis was authorized "to declare, prevent, and abate nuisances on public or private property, and the causes thereof" (p. 383).

While the court remarks that the charter does not expressly give the city power to declare smoke a nuisance, and remarks that—

> "notwithstanding the broad terms in which the power is given, it is not competent for the city to declare that a nuisance which is not so in fact"—

the argument of the court against the power to declare smoke a nuisance in the terms that the ordinance did, applies as well to the power of the State as of the city, as is shown by the following quotation:

> "This court, in River Rendering Company *vs.* Behr, 77 Mo. 91, announced a safe and conservative rule on this subject. Said the court: 'We do not deny that the general assembly may confer upon municipal authorities the power to abate nuisances, and to declare what shall be deemed nuisances, but the latter power can not be so absolute as to be beyond the cognizance of the courts to determine whether it has been reasonably exercised in a given case or not.' . . .
>
> "No one, we suppose, will doubt that dense smoke may be emitted in such quantities as to become an intolerable nuisance, both to the public and individuals, but the question before us is the power of the city under its charter to declare every emission of black dense smoke or thick gray smoke a nuisance, irrespective of the length of time it is emitted, or whether it is in fact a nuisance, without providing for an inquiry as to these facts. In a word, is such an ordinance not so unreasonable that the courts should declare it void for that reason? Now, it was admitted at the bar of this court by the learned

special counsel who argued the case for the city, that the emission of 'dense black' or 'thick gray' smoke for one or two minutes constitutes an offense under this ordinance, and yet he admitted that up to this time no device or means was known or had been invented whereby such smoke could under all circumstances be suppressed or prevented; that in the first starting of a fire, before the coal or wood was thoroughly ignited, dense smoke would necessarily be emitted, but he avoided this objection to the ordinance by claiming that the inspectors employed to detect violations of the ordinance exercise a wise discretion in such cases, and do not attempt to prosecute every emission of 'dense black' or 'thick gray' smoke.

"Now the ordinance itself would punish every housekeeper who kindled a fire to cook his or her morning meal, or to warm the house. Every replenishing of the furnace, whether in the heart of the business centers or upon the remote western boundary of the city, would alike subject the owner to punishment. No exception whatever is made as to time or quantity. When it is considered, and it must be by this court, that St. Louis has attained its growth in population and wealth in a large degree from the fact of its proximity to the great mines of bituminous coal which lie at its very door, and that this fuel has enabled it to become a great manufacturing city, and that this soft coal is peculiarly liable to produce this objectionable dense smoke, it seems to us that this ordinance, which makes no reasonable allowance for the regulation of this smoke, but essays, in advance of any known device for preventing it, to punish all who produce it to any degree whatever is wholly unreasonable. On the other hand, if, as learned counsel suggests, the ordinance is not enforced in all its strictness, but much is left to the discretion of the inspectors, then we have an unregulated official discretion which of itself renders the ordinance void, for it can not be tolerated that the rights of a citizen in this State shall depend entirely upon the caprice of any official, high or low.

> All valid ordinances must fix the duty or liability of the citizen by certain intelligible prescribed rules, so that he may govern himself accordingly.
>
> "Our conclusion is, that, while it is entirely competent for the city to pass a reasonable ordinance looking to the suppression of smoke when it becomes a nuisance to property or health, or annoying to the public at large, this ordinance must be held void because it exceeds the powers of the city under its charter to declare and abate nuisances, and is wholly unreasonable."

This reasoning places the invalidity of the ordinance upon its unreasonableness, rather than upon want of delegated power in the municipality.

In the case of State *vs.* Mott, the ordinance of the city of Baltimore prohibited kilns from burning oyster shells or stone lime within the city limits. The grant of power to the city by the State was as follows:

> To "have power to pass ordinances to preserve the health of the city, to prevent and remove nuisances, and to prevent the introduction of contagious diseases within the city and within three miles of the same, and may regulate the places for manufacturing soap and candles, the erecting of slaughter-houses and distilleries, and where every other offensive trade is carried on."

After stating that this grant of power was not broad enough to justify the ordinance, the court said:

> "Now it is well known and understood that the burning of lime is not an unlawful business or trade, and is not a nuisance in its nature, *per se*, irrespective of the location. On the contrary, it is one of the multitude of most useful and necessary processes for the benefit of society and for its material improvement, but which may, from mere local conditions, become nuisances (p. 306).
>
> . . . . . .
>
> "But the provision in the charter only confers authority 'to prevent and remove nuisances,' and the

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mere possibility that all the lime kilns within the limits of the city may, in the future, become nuisances, does not justify the city in prohibiting the business entirely in anticipation" (page 307).

. . . . . .

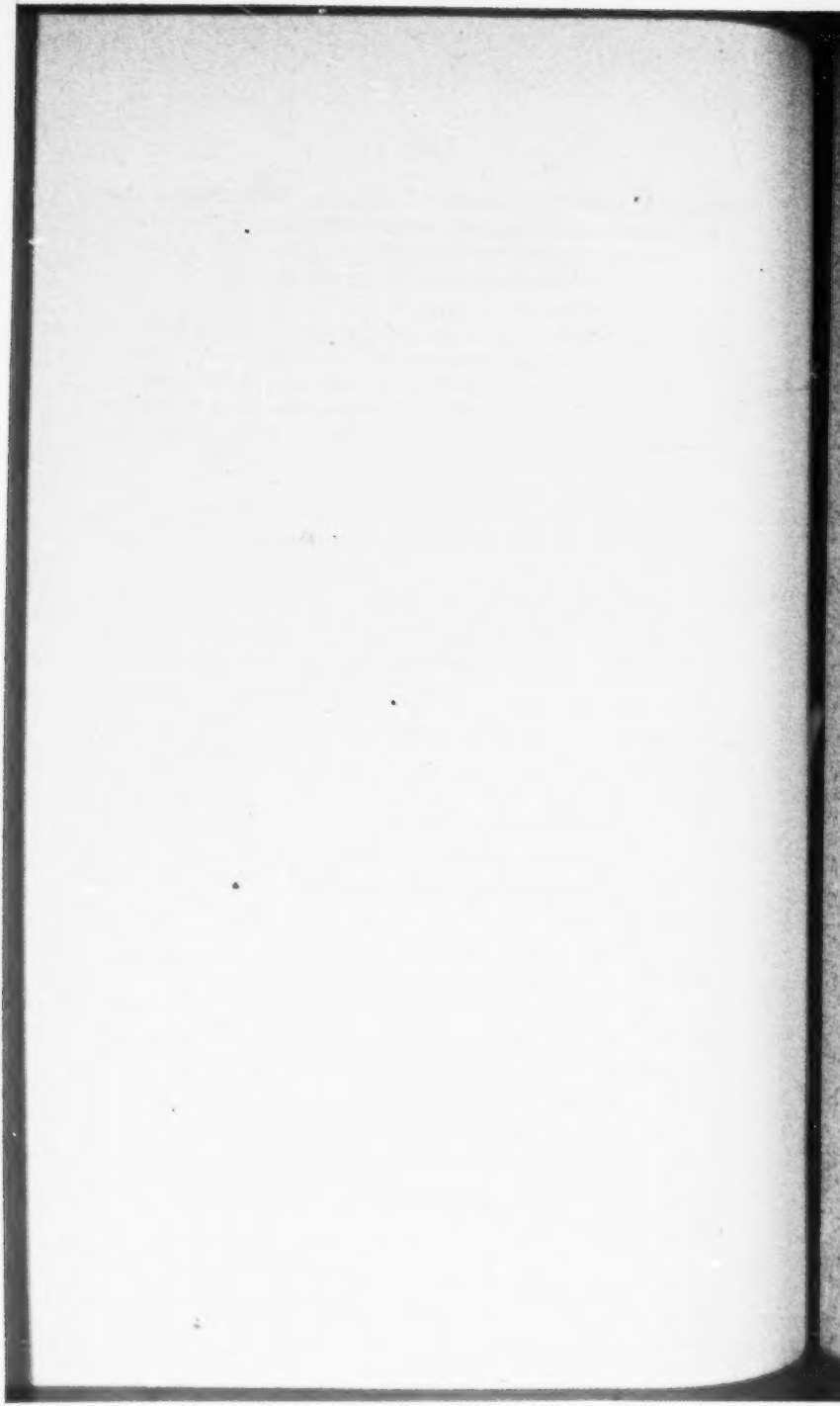
"Whether a particular lime kiln is a nuisance or not is a mixed question of law and of fact; and an indictment for maintaining such kiln as a nuisance should charge the facts necessary to bring it within the definition of a nuisance, or, at least, within the power conferred by the statute to suppress it. Here the power conferred by the statute, and attempted to be executed by the general prohibitory ordinance, can not be taken to authorize the extra judicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not or may not be such. 1 Dillon on Mun. Corp. (3d ed.), sec. 374, and the cases there cited; Wood's Law of Nuisances, sec. 740" (page 307).

The court nowhere intimates that the legislature might have made a valid enactment to like effect, but the contrary is inferable from the opinion and the authorities cited in support of it.

It will be noticed that the reasons given by the courts for holding invalid the ordinances mentioned in the three cases last cited were that they were unreasonable and in restraint of private right. Would they have been less so if they had been enacted by the legislatures?

It must be apparent, as was offered to be proved in the case, that it would be utterly impossible to operate a plant like the one described in the evidence in this case, with any kind of fuel or with any sort of appliances, without at times emitting for a few minutes the condemned smoke, and, if such is the proper construction of the statute, then it is undoubtedly void, as it would deprive many persons and corporations within the District of Columbia of the use of their property.

J. J. DARLINGTON,
C. C. COLE,
Attorneys for Plaintiff in Error.



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IN THE

Supreme Court of the United States.

October Term, 1903.

No. 94.

LINDLEY E. SINCLAIR, PLAINTIFF IN ERROR.

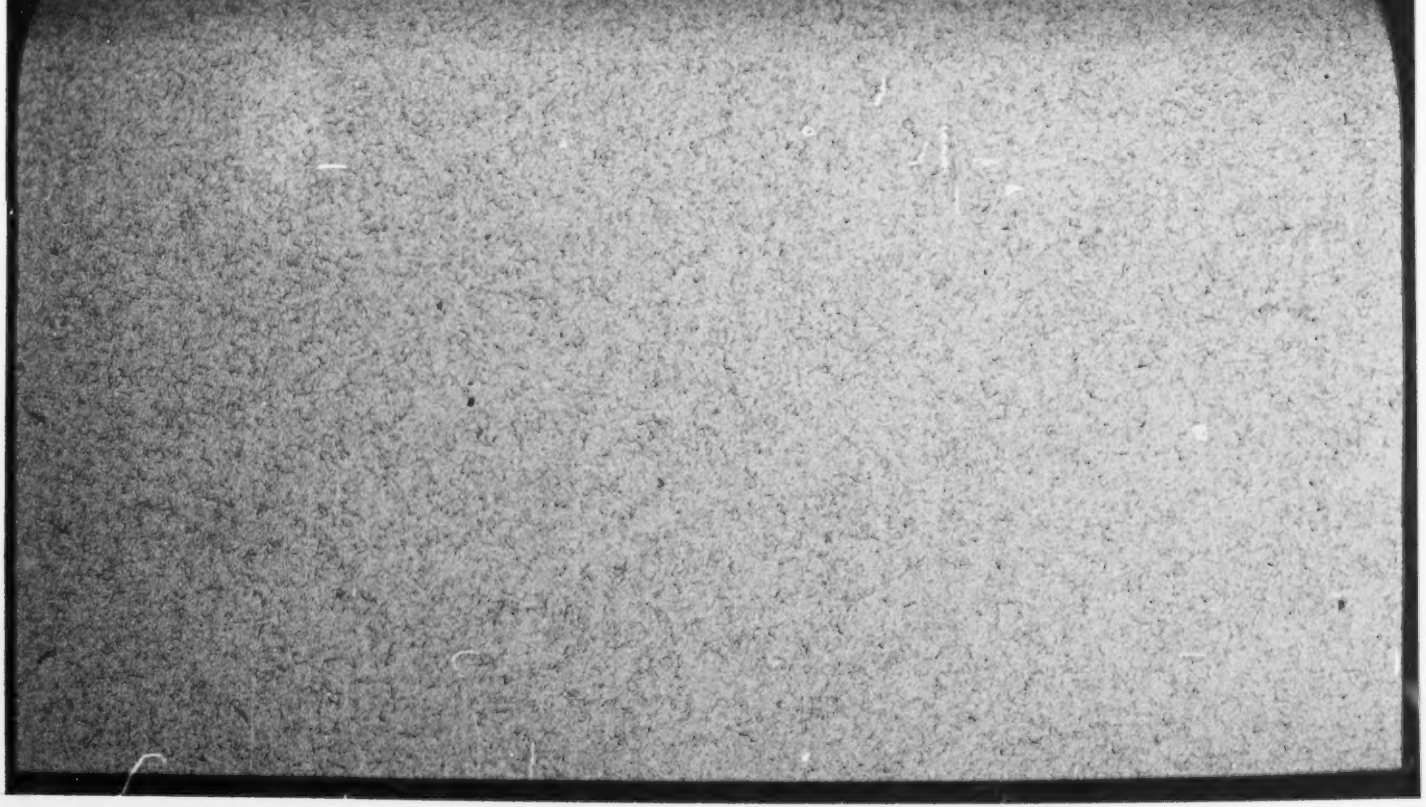
vs.

THE DISTRICT OF COLUMBIA.

BRIEF OF DEFENDANT IN ERROR.

A. B. DUVALL,
E. H. THOMAS,
Attorneys for Defendant in Error.

Press of Washington Monotype Printing Co.



Supreme Court of the United States.

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LINDLEY E. SINCLAIR, PLAINTIFF IN ERROR.

vs.

THE DISTRICT OF COLUMBIA.

MOTION TO DISMISS WRIT OF ERROR.

Now comes the defendent in error, The District of Columbia, by its attorneys, and moves the court to dismiss the writ of error in this cause for want of jurisdiction in this court because,

(*a*) The review of the proceedings of the police court of the District of Columbia by the Court of Appeals of said District is final by virtue of the provisions of law giving jurisdiction to said Court of Appeals so to do;

(*b*) This case does not involve any pecuniary matter in dispute and is a criminal case;

(*c*) There is no question involving the validity of a treaty or statute of, or an authority exercised under the United States.

And in addition to the above motion, the defendant in error, by its attorneys, further moves the court to affirm the judgment of the Court of Appeals of the District of Columbia on the ground that the question on which the jurisdiction depends is frivolous.

ANDREW B. DUVALL,
EDWARD H. THOMAS,
Attorneys for the District of Columbia.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS.

THE REVIEW OF THE PROCEEDINGS OF THE POLICE COURT BY THE COURT OF APPEALS IS FINAL BY THE ACTS OF CONGRESS.

The police court of the District of Columbia was established by Act of Congress approved June 17, 1870 (16 Stat., 153, R. S. D. C., Sec. 1049) and consisted originally of one judge appointed by the President, by and with the advice and consent of the Senate, for a term of six years.

That Statute provided that:

> "The police court shall have original and exclusive jurisdiction of all offenses against the United States committed in the District not deemed capital or otherwise infamous crimes, that is to say, of all simple assaults and batteries, and all other misdemeanors not punishable by imprisonment in the penitentiary; and of all offenses against the laws and ordinances of the District in force therein."

Sec. 773 of R. S. D. C. provided that:

> "Appeals from the police court shall be tried on the information filed in the court below, certified to Supreme Court by a jury in attendance thereat, as though the case had originated therein, and the judgment of the Supreme Court shall be final in the case."

It has been held that this provision for an appeal did not secure trial by jury within the constitutional requirements where the defendants were charged with conspiracy.

Callan *vs.* Wilson, 127 U. S., 540.

By the Act of March 3, 1891 (Supplement to R. S. U. S., 2d ed., p. 912) provision was made for a bill of exceptions in the police court and that the Supreme Court of the District of Columbia might allow a writ of error upon which the police court was required to "forthwith send up the informa-

tion filed in the cause and a transcript of the record therein, certified under the seal of said court, to said Supreme Court in general term for review and such action as the law may require."

But when the Court of Appeals of the District of Columbia was organized under the Act of February 9, 1893 (27 Stats., 434), no provision was made for review of proceedings of the police court by appeal or writ of error.

By Act of March 2, 1897 (2d Supp. R. S. U. S., 570) provision was again made for writ of error to the police court if a justice of the Court of Appeals "be of the opinion that the same ought to be reviewed."

It is there provided that such writ of error shall issue out of the Court of Appeals addressed to the judge of the police court.

Previous legislation on this subject was superseded by the Code of the District of Columbia.

Sec. 227 of that Code provides:

> "If, upon the trial of any cause in the police court, an exception be taken by or on behalf of the United States, the District of Columbia, or any defendant to any ruling or instruction of the court upon matter of law, the same shall be reduced to writing and stated in a bill of exceptions, with so much of the evidence as may be material to the question or questions raised, which said bill of exceptions shall be settled and signed by the judge within such time as may be prescribed by rules and regulations which shall be made by the Court of Appeals of the District of Columbia for the transaction of business to be brought before it under this section, and for the time and method of the entry of appeals and for giving notice of writs of error thereto from the police court of the District of Columbia; and if, upon presentation to any justice of the court of Appeals of the District of Columbia of a petition which, in the case of a defendant, shall be verified, setting forth the matter or matters so excepted to, such justice shall be of opinion that the same ought to be reviewed, he may allow a writ of error in the cause, which shall issue out of the said Court of Appeals,

addressed to the judge of the police court, who shall forthwith send up the information filed in the cause and a transcript of the record therein, certified under the seal of said court, to said Court of Appeals for review and such action as the law may require, which record shall be filed in said Court of Appeals within such time as may be prescribed by the Court of Appeals, as hereinbefore provided. Any party desiring the benefit of the provisions of this section shall give notice in open court of his or its intention to apply for a writ of error upon such exceptions and thereupon proceedings therein shall be stayed for ten days: *Provided*, That the defendant seeking an appeal shall then and there enter into recognizance, with sufficient surety to be approved by the judge of the police court, conditioned that in the event of a denial of his application for a writ of error he will, within five days next after the expiration of said ten days appear in said police court and abide by and perform its judgment, and that in the event of the granting of such writ of error he will appear in said Court of Appeals of the District of Columbia and prosecute the writ of error and abide by and perform its judgment in the premises. Upon failure of any defendant to enter into the recognizance provided for in this section the sentence of the police court shall stand and be executed; otherwise execution shall be stayed pending proceedings upon his application for a writ of error and until final disposition thereof by the said Court of Appeals."

The police court is not a court of the United States within the meaning of the Constitution.

United States *vs.* Mills, 11 App. Cases D. C., 500.

It is submitted that an examination of the appellate jurisdiction of the Court of Appeals to review the rulings of law by the police judge, depending as it does upon discretion of the justice of the Court of Appeals in the allowance of a writ of error, considered in connection with the limitations attending the right to obtain the writ, such as notice in open court of intention to apply for the same, and other restrictions, and the legislation previously existing on the subject, indicate the intention of Congress to confine the right of review of the

proceedings of this municipal tribunal organized for the trial of minor offenses to the Court of Appeals.

If such be not the true legal solution, then, it seems that, inasmuch as Sec. 227 of the Code of the District of Columbia provides, "*if upon the trial of any cause*" in the police court of the District of Columbia "the United States, the District of Columbia, or any defendant" take exception "to any ruling or instruction," "upon matter of law" followed by the necessary steps to obtain the desired writ of error and it be allowed, every minor offense wherein a question is raised respecting the validity of a statute of the United States or an authority exercised under the United States, including, for example, all police, building and plumbing regulations, whether made by Congress or by the Commissioners of the District of Columbia acting under the authority of Congress, may be reviewed ultimately by writ of error to this court, while, on the contrary, for capital offenses and other crimes, persons indicted and tried in the Supreme Court of the District of Columbia, whose cases are reviewed by the Court of Appeals, cannot secure further review thereof by writ of error or appeal to this court.

In re Heath, 144 U. S. 92.
Cross *vs.* United States, 145 U. S. 571.
Cross *vs.* Burke, 146 U. S. 82.
Chapman *vs.* United States, 164 U. S. 436.

II.

THIS IS A CRIMINAL CASE INVOLVING NO PECUNIARY MATTER IN DISPUTE MEASURABLE BY SOME SUM OR VALUE IN MONEY, HENCE THIS COURT HAS NO JURISDICTION TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS.

The Court of Appeals of the District of Columbia was organized by Act of February 9, 1893 (27 Stats. 434), which Act, by Sec. 8, provides:

> "That any final judgment or decree of the court of Appeals may be re-examined, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the Supreme Court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States."

Sec. 233 of the Code of the District of Columbia provides that:

> "Any final judgment or decree of the Court of Appeals may be re-examined and affirmed, reversed or modified, by the Supreme Court of the United States, upon writ of error or appeal; in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

We observe that the jurisdicton of the police court of the District of Columbia is essentially confined to minor crimes and police regulations. The plaintiff in error was prosecuted by information and convicted of violation of an Act of Congress, approved February 2, 1899 (30 Stat. 812), for the prevention of smoke in the District of Columbia (Record, page 1), and was adjudged guilty and sentenced "to pay a fine of fifty dollars, and in default to be committed to the workhouse for the term of ninety days." (Record, page 3.)

This fine is by this judgment a punishment for the offense committed and is not a "matter in dispute," and, in cases such as this, criminal in character, the question is the guilt or innocence of the accused.

U. S. *vs.* More, 3 Cranch, 159.

Sec. 8 of the Act of February 9, 1893, and Sec. 233 of the Code of the District of Columbia are substantially alike.

It was decided, so we understand, in Chapman *vs.* United States, 164 U. S. 436 (L. ed. Bk. 41, p. 504), that the former act referred to cases only where there was a pecuniary matter in dispute, measureable by some sum or value, and referred neither to criminal cases nor to cases where the question was of the guilt or innocence of the accused.

See, also, Cross *vs.* Burke, 146 U. S. 82.

III.

THERE IS NO QUESTION RAISED IN THE RECORD INVOLVING THE VALIDITY OF A TREATY OR STATUTE OF, OR AN AUTHORITY EXERCISED UNDER THE UNITED STATES.

Congress by Act of February 2, 1899 (30 Stat. 812), provided:

> "That on and after six months from the passage of this act the emission of dense or thick black or gray smoke or cinders from any smokestack or chimney used in connection with any stationary engine, steam boiler, or furnace of any description within the District of Columbia shall be deemed, and is hereby declared, to be a public nuisance: *Provided*, That nothing in this act shall be construed as applied to chimneys of buildings used exclusively for private residences.
>
> "SEC. 2. That the owner, agent, lessee, or occupant of any building of any description from the smokestack or chimney of which there shall issue or be emitted thick or dense black or gray smoke or cinders within the District of Columbia on or after the day above named shall be deemed and held guilty of creating a public nuisance and of violating the provisions of this act.

> "SEC. 3. That any person or persons violating the provisions of this act shall, upon conviction thereof before the police court of the District of Columbia, be punished by a fine of not less than ten dollars nor more than one hundred dollars for each and every offense; and each and every day wherein the provisions of this act shall be violated shall constitute a separate offense."

It seems reasonably clear that in order to give this court jurisdiction in such case as this the power of Congress to pass the Act of February 2, 1899, and not the mere judicial construction of that Act must be involved.

Baltimore & Potomac R. *vs.* Hopkins, 130 U. S. 210.
District of Columbia *vs.* Gannon, 130 U. S. 227.
United States *vs.* Lynch, 137 U. S. 280.
Glenn *vs.* Garth, 147 U. S. 360.
County of Cook *vs.* Calumet, etc., Co., 138 U. S., 635.
Terry *vs.* County of King, 141 U. S. 668.
U. S. *vs.* Seymour, 153 U. S. 353.
Snow *vs.* U. S., 118 U. S. 346.

We contend that it does not appear directly or by clear and necessary intendment that the power of Congress to pass the Act making the emission of a certain character of smoke in the enumerated cases, a nuisance and punishable by fine, was involved according to the record, and that, therefore, this court will not entertain jurisdiction.

Crowell *vs.* Randall, 10 Pet. 368.

It appears that the principal question submitted to the Court of Appeals was whether there was a variance between the allegation in the information filed in the police court (Record, p. 1) which described the building containing the smokestack used in connection with the furnace as number 213 14th street northwest, in the city of Washington, District of Columbia, and the evidence contained in the Bill of Exceptions (Record, pp. 5 to 17). This also appears from the opinion of Mr. Justice Shepard (Record, pp. 18 and 19).

The District of Columbia contended that there was evidence

sufficient to support the verdict on the point of agreement of this allegation with the proof.

The witness, Wollard, testified (Record, top p. 6) that the smokestack "comes from the center of the building known as 213 Fourteenth street," and that the "premises" or "plant" were connected with that number (Record, p. 5). The plaintiff in error claimed that the building 213 14th street was a separate building from the power station, which had no number on it (Record, pp. 8, 9, and 10). The evidence on this disputed point occupies the principle portion of the Record to the middle of page 11, when the plaintiff in error produced John T. Sullivan as a witness and asked him, "What can you tell us as to the possibility of conducting or operating a plant which will produce power for lighting purposes without the emission at times of dense gray or black smoke?"

The Record proceeds (lower part of page 11) "To this question counsel for the District of Columbia objected; whereupon counsel for the defendant stated: If the court please, this is a formal proof as to which I concede I think your honor is concluded by the opinion of the Court of Appeals. Of course, it is for you to decide about that. The point I propose is this: This company, under the express or implied license of Congress, or both, has expended a very large amount of money in establishing a plant here in the District of Columbia. It is charged with great public duties. The lighting of the streets of the city is a part of its duty, in addition to the illumination of public and private residences and business houses. It is under a legal obligation to perform this work. It would be liable in damages if it refused. The point that I wish to make is that any act, especially an act passed after a company has been authorized and directed to expend large sums of money in installing costly and important public improvements, which deprives it of the power of using its property, an act which disables it from performing a public duty, for the neglect of which or the failure to perform which it would be liable in damages, would be an unconstitutional act; and if we can prove to the satisfaction of the jury that the emission of such smoke under such circumstances as shown

in this case is absolutely indispensable to the company's enjoyment of its property and to the performance of its public duties which it is obliged to perform, then to that extent the act would be unconstitutional. We offer this testimony in that connection, and we offer to prove the facts to which we refer. Mr. Pugh: To that we object, if your honor please. The Court: Have you anything to say on the matter, gentlemen? Mr. Thomas: We contend, your honor, that that point was expressly passed upon and decided in the Moses case. The Court: The objection is sustained. Mr. Darlington: We except to the exclusion of the evidence; which exception was duly allowed."

Who authorized or directed the company to instal what was called "important public improvements" or to what public authority such company would be responsible for consequential damages, does not appear. It is not pretended that the company had any vested charter rights from Congress disturbed by the smoke law. It does not clearly appear, we submit, that there was by virtue of the smoke ordinance any taking of private property nor any violation of any vested contract right.

This proposition was not, however, presented to the Court of Appeals. The five rejected prayers offered by the plaintiff in error (Record, pp. 13 and 14) raised no question respecting the power of Congress to pass the smoke ordinance.

The 1st and 2d prayers granted on behalf of the District of Columbia (Record, middle p. 12) were rules which the court gave to the jury out of caution by way of prevention of determination of matters of law by the jury.

We submit, however, that these prayers in so far as they may indirectly raise the question of the validity of such police ordinance were correct.

Moses *vs.* United States, 16 App. Cases D. C. 428.

Bradley *vs.* District of Columbia, 20 App. Cases D. C. 169.

That no objection was made in the Court of Appeals on behalf of the plaintiff in error sufficient to raise any justly debatable question respecting the power of Congress to enact

the smoke ordinance, appears from the assignment of errors in that court, which we copy from the brief filed therein by counsel.

"ASSIGNMENTS OF ERROR.

"The police court erred in the following particulars:

"I. In admitting testimony as to the character of the coal used in the power plant building, with the supplying of which coal the appellant was not shown to have, and in fact did not have, any connection.

"II. In excluding evidence on behalf of appellant that such emissions of smoke as were shown in the evidence was indispensable to the company's enjoyment of its property and the performance of the duties which it was legally compellable to perform.

"III. In instructing the jury that, if the appellant had 'an agency in the control of the furnace at the premises mentioned in the information and evidence,' he was an occupant.

"IV. In instructing the jury that, if the defendant was 'the superintendent of the owner of said building mentioned in the information and evidence, and had control of the furnace or of the engineer, or other persons, if any, who operated the same,' he was an occupant.

"V. In instructing the jury that, if the appellant was 'the superintendent of the building situated at 14th and B streets N.W., in the city of Washington, District of Columbia, described in the information as 213 14th street N.W., and known as the plant of the United States Electric Lighting Co.' he was an occupant.

"VI. In refusing to instruct the jury to return a verdict for the defendant.

"VII. In refusing to instruct the jury to acquit unless they believed from the evidence that the defendant was an occupant of the building from the smokestack or chimney of which the smoke referred to in the evidence was emitted.

"VIII. In refusing to instruct the jury to acquit unless they found from the evidence that the appellant was the occupant of the premises described in the information, and

that he participated in or controlled the use of the furnaces or appliances which caused or emitted the smoke.

"IX. In refusing to instruct the jury that they could not infer or find that the appellant was the occupant of the premises from the mere fact that he was known as general superintendent of the Lighting Company, and was a superior officer of the witness Bolton, unaccompanied by evidence satisfactory to them that he was in control of or participated in the operation of the plant which caused the smoke.

"X. In informing the jury that, in New York and elsewhere, power is created by engines, boilers or furnaces, the smoke of which passes through a smokestack, which need not be within half a mile of where the power is applied, or connected with or anywhere near such place, and that this was an illustration which they might use in passing upon the guilt or innocence of the appellant.

"XI. In instructing the jury that they should not acquit although they should find that there was no smokestack attached to No. 213 14th street N.W., the only premises described or referred to in the information."

Respectfully submitted.

ANDREW B. DUVALL,
EDWARD H. THOMAS,
Attorneys for District of Columbia.

Argument on the Merits.

The 5th and 6th assignment of errors, (Brief for Plaintiff in error pages 8 and 9) do not raise any question respecting the validity of the Act of Congress nor of the power of Congress to legislate on the subject. These assignments are claims of mere error in the trial of a criminal cause or *quasi* criminal cause, committed by a police judge.

In the police court and now in this Court, this *quasi* public corporation, seeks to be acquitted on a minor matter. There is, however no error in the record respecting either the evidence or rulings of the police judge.

The third instruction on part of the defendant (Record, p. 13) asked the court to say to the jury in effect that unless they found there was a smokestack on the identical building (which we say was part of the whole plant) of which the defendant was an occupant, they must acquit the defendant.

We observe that the prayer is misleading in that it required the jury to acquit because there might not have been a smokestack or chimney over the very place where the number 213 Fourteenth street was located. We will therefore consider this third prayer in connection with the evidence and further instructions of the court growing out of the question asked of the court by the jury (Record, pp. 14–15), which is as follows:

"According to the information, if we find that there was no smokestack attached to the building No. 213 14th street N. W., then should our verdict be not guilty?"

Counsel for the District of Columbia (Record, p. 15) stated the point to be "whether this building No. 213 is connected with the plant and not whether there is a smokestack or chimney on the identical piece of property No. 213 etc."

Counsel for the defendant replied:

Mr. DARLINGTON: "If the court please, we are there charged with causing smoke to issue from a chimney connected with part of premises No. 213 14th street N. W. Your honor referred to the jury the question whether or not No. 213 14th street was the building with which the chimney was connected and from which the smoke issued. Now, the jury ask you a very plain question. They say, if we find that the smokestack is not connected to No. 213 14th street should our verdict be not guilty? Is any court in the world to say that a man may be indicted or informed against for occupancy of and causing smoke to issue from one building and be convicted for occupancy of and causing smoke to issue from another and different building? The COURT: Gentlemen of the jury, you are the judges of the fact, from the evidence before you, whether the building 213 is a part of the general building in which this power is made and from which the smoke escapes through this smokestack. You have the evidence. It is not for me to say whether the gate which connects 213 with the other premises connects it. You are the judges of the fact, and that is a question of fact for you to determine, and it is for you to determine whether the building from which this smoke is emitted is the building described in the information, having thereto attached the smokestack, furnace, steam boiler, and a stationary engine for some kind of work. 213 is named in the information, but the evidence is before you to determine whether the smokestack is connected with the premises, the emission from which of such smoke violates the law in making the nuisance. That is my understanding of it, and the testimony is before you to determine whether they are the same building or not."

The court finally told the jury (Record, p. 16) that they were not to acquit the defendant if they found there is no smokestack attached to the building 213 Fourteenth street

N.W. (meaning that identical building), and answered, "In the light of all the evidence and the instructions, I say no."

The contention of the defendant's counsel is in effect that this is a variance, while such is not the case, we submit.

We contend that the question is not as to the particular point of location of the smokestack, but is whether under the act of Congress (30 Stat., 812) there was "the emission of dense or thick black or gray smoke from any smokestack or chimney *used in connection with any stationary engine*," etc., and that the words in the second section of the act, "from the smokestack of which (building) there shall issue," etc., refers this case to the point stated (and argued to the jury), whether the building No. 213 is connected with the whole premises.

To have answered "Yes" to the question of the jury would have been a withdrawal from their consideration of all evidence relating to the entirety of the premises and their connection with each other. The case was therefore left to the jury to say whether these premises were one connected premises, and they have answered it in the affirmative by their verdict, and have thus established that there was no variance.

(*a*.) There is evidence to support this finding.

Frank Wollard (Record, bottom of p. 5) testified on cross-examination:

"Q. What observation did you make to determine whether this smokestack of which you speak proceeds from the roof of the building No. 213 Fourteenth street northwest? A. The stack is plainly visible from the top of the District building.

"Q. Yes; but you cannot see the number '213 Fourteenth street' from the top of the District building, can you? A. I afterwards made two visits to No. 213 Fourteenth street

northwest and found the stack that I saw from the roof of the District building was connected with that number.

"Q. How is it connected with No. 213? A. It rises about the center of the building—those premises," etc.

The witness further testified that he does not know that there is a twenty-foot space between 213 Fourteenth street and the power-house with which the smokestack is connected (Record, top of p. 6).

Henry S. Bolton testified (Record, p. 8):

"That the office of the defendant Sinclair was in number 213 14th street northwest, and that this building is across an alley from the plant, but whether it is a private or public alley witness could not say; that there are gates at the entrance to this alley, used to close this alley, extending from the north wall of the power plant to the south wall of number 213 14th street, and that through this alley coal and supplies of different kinds are brought into the power plant, the gates being opened when the carts or wagons come in and closed when they go out.

"Upon cross-examination the witness Bolton testified that the vacant space between the power plant and number 213 14th street is about eighteen feet.

"Upon redirect examination the witness stated that the power station fronts about 120 feet on 14th street and 220 feet on B street, and that it does not include number 213 14th street; that he is speaking of the building containing the machinery and is cutting out the eighteen-foot alley; that the building comprised within said 120 feet on 14th street and 220 feet on B street is the building containing the machinery, and that it is situated at 14th and B streets; that the fence or gates simply run from the north wall of the power plant to the south wall of number 213 14th street,

but connects from building wall to building wall, parallel to the building line of the street where the machinery is. Q. Does not the same fence connect the premises? A. There is a gate across the alley from the building containing the machinery. Q. Does that connect the premises? A. I don't know. Q. Do you know what 'connect' means? A. No. Q. You do not? A. Not in a legal sense. Q. Well, in general, common sense, ordinary sense? A. Why, certainly; there is a gate connecting one building to the other. Q. The premises are connected, then, are they not, in that manner? Mr. DARLINGTON: Connected by a fence between them? Mr. THOMAS: Yes. A. Yes." (Record, p. 9.)

The only witness who attempted to dispute this evidence is James B. Lackey (Record, top of p. 10), who said that the building designated as number 213 Fourteenth street is not connected in any way with the power-plant building.

The weight of the evidence is therefore in favor of the conclusion of the jury; but, whether so or not, the jury were the proper arbiters of the fact of identity and connection, and their verdict is that the premises were connected and substantially the same.

In the light of the answer of the court to the inquiry of the jury, it is believed that the court's illustration is immaterial.

The nuisance is admitted in this case and its existence has also been determined by the verdict of the jury.

That dense black smoke was emitted from the chimney at the plant of the United States Electric Light Company is not a controverted question.

The constitutional validity of the Act of Congress was unquestioned save in one particular, *i. e.*, the right of said Company, by virtue of its supposed public duties, to cause the nuisance untrammeled by legislative restriction.

The capacity of this chimney, wherever located, to create

the nuisance by emission of the prohibited smoke, affords a strong illustration for the necessity of such an Act of Congress.

The record states (middle of page 5) that "the smoke comes from the black, round, iron stack of the U. S. Electric plant and chimney which is attached to thirteen furnaces and boilers and eight stationary engines in the plant of that Company."

The position of counsel in the trial court was that this plant could not be operated without the emission at times of dense gray or black smoke, and it was to the rejection of an offer to prove that fact that an exception was taken (which was apparently abandoned in the Court of Appeals). The question was thus stated:

"What can you tell us as to the possibility of conducting or operating a plant which will produce power for lighting purposes without the emission at times of dense gray or black smoke?" (Record, middle p. 11.)

An inspection of the prayers granted and rejected will likewise disclose an admitted nuisance and a total absence of any suggested question of want of power in Congress to pass the Act mentioned (Record pp. 12, 13 and 14) unless such question be raised by the prayers granted on behalf of the District of Columbia.

The effect of the failure to controvert the evidence of the existence of dense smoke makes apropos the language of the Supreme Court of Illinois in a similar case.

"Nor will any subtle distinctions be indulged as to what is meant by 'dense smoke,' as those terms are used in the ordinance. The terms used will be understood as commonly employed, and this court will understand by 'dense smoke,' precisely what everybody else does that has ever seen a volume of dark, dense smoke as it comes from the smoke-stack or

chimney where common soft or bituminous coal is used for fuel in any considerable quantities."

Harmon *vs.* City of Chicago 110 Ill. 407.

In the above case it was conceded as a fact that "the effect of 'dense smoke' emitted from a smoke-stack or chimney 'is detrimental to certain classes of property and business within the limits of the City of Chicago, and is a personal annoyance to the public at large within the City'," and the Court added, "*It is a public nuisance, in the midst of a large and densely populated city, whether it is so declared by ordinance or not.*"

Harmon *vs.* City of Chicago 110 Ill. 406.

In the Fifth Baptist Church case, counsel for the Railroad claimed the right to commit the nuisance by virtue of an Act of Congress which it was claimed authorized the construction and use of the building which created the nuisance. A similar contention was made in the police court in this case without the same excusable basis. (See this brief page 9.)

But in the reported case mentioned such contention was answered. The opinion states (Book 27 page 744 L. ed.)

"It admits, indeed of grave doubt whether Congress could authorize the Company to occupy and use any premises within the City limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the Company from liability to suit for damages or compensation, to which individuals, acting without such authority, would be subject under like circumstances."

The Court further said: "There are many lawful and necessary occupations which, by the odors they engender, or the noise they create, *are nuisances when carried on in the heart of a city*, such as the slaughtering of cattle, the training of tallow, the burning of lime, and the like. Their presence

near one's dwelling house would, often render it unfit for habitation.

"It is a wise police regulation, essential to the health and comfort of the inhabitants of a city, that they should be carried on outside of its limits."

Baltimore & Potomac R. Co. *vs.* Fifth Baptist Church, 108 U. S. 317, (L. ed. Book 27 p. 745.)

THE EMISSION OF DENSE OR THICK BLACK OR GRAY SMOKE OR CINDERS IS A PUBLIC NUISANCE WHEN OCCURRING WITHIN THE LIMITS OF A POPULOUS CITY.

1 Wood on Nuisances secs. 506 and 507 states:

"In Crump *vs.* Lambert, the defendant erected in the vicinity of the plaintiff's dwelling an establishment for the manufacture of iron bedsteads, containing two blast furnaces, one of which was in constant operation, for the purpose of smelting iron, in which operation coke was burned and lime used as a flux. A large quantity of coal was also used in driving a steam engine and at smith's forges in the factory. The smoke and effluvia passed off through a chimney fifty feet in height, located about fifty-eight yards from the plaintiff's house. Large quantities of smoke issued from the chimneys and settled upon and around the plaintiff's house, and interfered with the comfortable enjoyment of life there. Upon the hearing before Lord Romilly, M. R., the defendant insisted that smoke alone, or noise alone, or noxious vapors alone, would not create a nuisance; but the court said: 'With respect to the question of law, I consider it to be well settled by numerous decisions that smoke unaccompanied with noise or noxious vapors, that noise alone, that offensive vapors alone, although not injurious to health, may severally constitute a nuisance to the owner of adjoining or neighboring property; * * * and the rule upon the

subject is the same, whether it be enforced by action at law or a bill in equity."

"The doctrine of this case has been adopted by the courts of this country, and it may be regarded as well settled that smoke alone, whether accompanied with cinders or not, is a nuisance whenever it is developed in sufficient quantities to interfere with the comfortable enjoyment, physically, of adjoining property."

The case of Crump *vs.* Lambert, referred to in Wood on Nuisances is cited with approval by Mr. Justice Field in his opinion in the Baltimore and Potomac Railroad Company *vs.* Fifth Baptist Church 108 U. S. 317 (L. ed. Book 27 p. 744), "That it is a nuisance, which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him."

Citing Crump *vs.* Lambert L. R. 3 Eq. 409

"It is a matter of common knowledge that smoke becomes soot, which falls and blackens where it rests; that it is injurious to vegetation, to many kinds of goods, and annoying to people. This common knowledge is so generally diffused in Chicago, that no jury could be without it."

Field *vs.* Chicago 44 Ill. App. 410-411.

Harmon *vs.* City of Chicago, 110 Ill. 400.

Coal smoke in large and densely populated cities is productive of much injury to property and annoyance to the inhabitants, while it is not attended with that result in country towns and villages; and it is for this reason that the law treats the subject of an act or ordinance regulating and compelling the consumption of smoke emitted by the burning of coal as a nuisance in cities, and confers on them power to regulate and suppress it within their corporate limits.

Cincinnati *vs.* Miller, 29 Ohio L. J. 364, 365.

See Note 39 L. R. A. 551 where the authorities are collected.

If a jury may infer as a matter of common knowledge that dense smoke is an injury and an annoyance (Field *vs.* Chicago, 44 Ill. App. 410-411) it would seem certain that the courts may infer the same thing.

Facts which are a part of the experience and common knowledge of the day are legitimate grounds for the judgment of the court.

Oppenhiem *vs.* Wolf, 3 Sandf. Ch. 571.

Courts will take notice of whatever is generally known within the limits of their jurisdictions.

Brown *vs.* Piper 91 U. S. 37.

The court will take judicial notice that a thing patented was known and in general use long before the issuing of the patent.

Terlirne *vs.* Phillips, 99 U. S. 592.

King *vs.* Gallun, 109 U. S. 99.

It is a well known rule that there is a strong presumption in favor of the constitutional validity of an Act of Congress and there is also a like presumption that Congress in enacting the questioned law inquired into and duly considered the effect, present and prospective, of the continued emission of dense black or gray smoke upon the safety, health and comfort of the public.

Moses *vs.* U. S. 16 App. Cases D. C., 428.

This Court said in Powell *vs.* Pennsylvania, 127 U. S. at p. 685: "And as it does not appear upon the face of the Statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts."

The same doctrine was approved in United States *vs.* Des Moines & C. Company, 142 U. S. 510. At page 544 the court said: "The knowledge and good faith of the legislature are not open to question. *It is conclusively presumed that a legislature acts with full knowledge*, and in good faith."

THE AUTHORITY OF CONGRESS TO PUNISH OR PROHIBIT ACTS WHICH ARE INJURIOUS TO PUBLIC HEALTH IS NOT LIMITED TO COMMON LAW NUISANCES, AND HENCE THE NATIONAL LEGISLATURE HAD POWER WITHIN ITS DISCRETION TO DECLARE THE EMISSION OF DENSE SMOKE, THROUGH THE STATED MEANS, TO BE A PUBLIC NUISANCE.

"A large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Lawton *vs.* Steele, 152 U. S. 136.

Where town authorities passed an ordinance prohibiting the use of steam as a motive power to propel any street car the ordinance was upheld and such use of steam was declared a nuisance *per se*.

The court said: "In doubtful cases, where the thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question."

North Chicago City R. Co., *vs.* Lake View 105 Ill. 207-212

Nuisances may thus be classified:

First, those which in their nature are nuisances *per se*, or are so denounced by the common law or *by statute*; second,

those which in their nature are not nuisances, but may become so by reason of their locality, surroundings or manner in which they may be conducted, managed, etc.; third, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds.

The power granted by the Statute to the governing bodies of municipal corporations to declare what shall be nuisances, and to abate the same, etc., authorizes such bodies to conclusively denounce those things falling within the first and third of these classes to be nuisances, but as to those things falling within the second class the power possessed is only to declare such of them to be nuisances as are in fact so.

Langel *vs.* City of Bushnell, 197 Ill. 26-27.

"But there can be no doubt of the right of the Legislature to pronounce, under its police power certain things or certain acts nuisances in themselves. Nor are such laws obnoxious to any constitutional provision, because they do not provide compensation to the individual whose liberty to keep or do them is restrained. It may forbid entirely the exercise of certain trades noxious or offensive, or trades which it holds to be such, or permit it under such safeguards as it may prescribe * * * Where anything is declared a nuisance by legislation, it is not competent for a party to show that it is not in fact one. The owner or keeper of intoxicating liquor proved to have been kept for unlawful sale cannot show that such keeping is not a nuisance in fact, when the legislature has declared it to be one. Rights of property are not indeed to be invaded under the guise of police regulations for the preservation of public order, the protection of public health, or to guard against threatened nuisances. If it appears that the real object and purpose of the regulation are other than these, the courts will interfere to protect the just rights of the citizen in his property."

Train *vs.* Boston Disinfecting Co., 144 Mass. 530-531.

The legislature in the exercise of its police power, may prohibit the use of any building in cities or towns of a certain population, for carrying on, without permission of the mayor and aldermen or selectmen, a trade necessary and lawful in itself, but which in its ordinary exercise may become a public nuisance.

Inhabitants of Watertown *vs.* Mayor, 109 Mass. 315.

The court in the above case said:

"But a perversion of this (police) power is not shown by the fact that the business restrained is a necessary and lawful business, *which has not yet become a public nuisance in fact*, or been declared such by the statute. The law most wisely interferes for the protection of the public by preventing in advance threatened and probable injury. Exposure to danger is itself an injury."

Inhabitants of Watertown *vs.* Mayor, 109 Mass. 319.

A statute is constitutional as an exercise of police power which declares any fence unnecessarily exceeding six feet in height, maliciously erected, a nuisance.

Rideout *vs.* Knox, 148 Mass. 368.

The Supreme Judicial Court of Massachusetts per Holmes J. declares that "It is settled that, within constitutional limits, the Legislature may change the common law as to nuisances, and move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances, although by so doing it affects the use or value of property."

Commonwealth *vs.* Parks 155 Mass. 532.

Under its police power the legislature can declare that cer-

tain things are nuisances *per se*, and privy vaults, as described in the statute, are embraced in such things.

Harrington *vs.* Board of Aldermen of City of Providence, 20 R. I. 233.

Where the validity of a statute which declared any dam or obstruction across a water course not provided with a fish way, a public nuisance, the court said:

"Our understanding is that it is the province of the legislature to prescribe what shall constitute a nuisance, within the fundamental limitations upon its authority. One definition of a nuisance is the unlawful use of one's own property, working an injury to a right of another or of the public, and producing such inconvenience, discomfort, or hurt that the law will presume a consequent damage. Wood Nuisances 1; 16 Am. & Eng., Ency. Law 923. The legislature has kept itself within the settled rule; for that the act of obstructing the passage of fish, against individual and public interests, would raise a legal presumption of damage, is too clear to be debatable."

State *vs.* Beardsley (Iowa 1899) 79 N. W. Rep. 138-141.

In the case of Sprigg *vs.* Garrett Park 89 Md. 406 the plaintiff sought an injunction against the town to prevent its interference with a water-tight cesspool which she had constructed at great expense for the reception of excrement and other waste matter. She produced evidence tending to show the superiority of this vault over any other known arrangement or method of disposing of such material. The act incorporating the defendant town gave it full power to regulate such appliances, and in pursuance thereof it passed an ordinance directing the use of water-tight dry earth boxes for these purposes, and prohibiting the construction or maintenance of cesspools similar to plaintiffs. The court held that the ordinance was valid; that the legislature regarded

such structures as plaintiff's a menace to the public health and deemed it essential to prohibit their construction or maintenance. Said the court:

"By whom was it to be determined whether such arrangements would be dangerous to the public health? * * * The record is full of testimony, some of it conflicting in the highest degree, as to whether the vault of the complainants may not become speedily so impaired in strength as that both gas and fluid will leak through its masonry; as to whether such vaults are the best arrangements for the disposal of waste; or whether boxes with dry earth are not more in accordance with the best principles of sanitary science. Who shall have power to decide such matters for the entire population of the town? The power must reside somewhere, so that all may be bound; else,as was said in Mugler *vs.* Kansas, 123 U. S. 623, 'Society will be at the mercy of the few, who, regarding their own appetites or passions only, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please.' 'Under our system,' it is said in the same case, 'that power is lodged with the legislative branch of the Government. It belongs to that department to exert what is known as the police powers of the state, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.' In doing this, however, it cannot treat a thing as a nuisance which cannot be one, *but it may declare that to be a nuisance which from its character, may and does become such*" (citing Baumgardner *vs.* Hasty, 100 Ind. 575; Inhabitants of Watertown *vs.* Mayor, 109 Mass. 697). "'Generally, it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated intended convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the

courts. But they must have some relation to these ends.' In the matter of Jacobs, 98 N. Y. 98; Tiedman Limitations of Police Powers, Sec. 122, 122A, 122B; Town of Lake View *vs.* Rose Hill Co., 70 Ill., 191.).

"The statute declares and defines a new species of public nuisance not known to the common law nor declared to be such by any prior statute. But we know of no limitation of legislative power, which precludes the legislature from enlarging the category of public nuisances, or from declaring places or property used to the detriment of public interests, or to the injury of the health, morals, or welfare of the community, public nuisances, although not such at common law. There are, of course, limitations upon the exercise of this power. The legislature cannot use it as a cover for withdrawing property from the protection of the law or arbitrarily, where no public right or interest is involved, declare property a nuisance for the purpose of devoting it to destruction. If the court can judicially see that the statute is a mere evasion, or was framed for the purpose of individual oppression, it will set it aside as unconstitutional, but not otherwise. (Citing *In re* Jacobs, 98 N. Y. 98; Mugler *vs.* Kansas, 123 U. S. 661.)"

Lawton *vs.* Steele, 119 N. Y. 226–233.

Two propositions of law were announced to the jury in the police court which we assume will be the subject of controversy, first, "that the emission of dense or thick black or gray smoke from any smokestack or chimney used in connection with any stationary engine, steam boiler or furnace of any description within the District of Columbia is a public nuisance." (Prayer No. 1, Record, p. 12) and that the jury are not at liberty to consider the policy of Congress in declaring "the emission of dense or thick black or gray smoke a public nuisance, as defined by the court in prayer No. 1; nor the necessity or supposed inconvenience or hardship, if any, of

such law, and that the policy of enacting such a law is a matter peculiarly and exclusively within the province of Congress, which cannot be disregarded or set aside by either the court or jury." (Prayer No. 2, Record, p. 12.)

If the constitutional objections be those previously urged in Moses *vs.* United States, 16 App. Cases D. C. 428, we affirm that the decision in that case was a correct exposition of the law.

In the Moses case the Court of Appeals per Mr. Justice Shepard said: "The next contention on behalf of the plaintiff in error is, that Congress had not the power to declare the emission of thick or dense black or gray smoke from chimneys a nuisance *per se* and punish the act as an offense, because the effect of the enactment is to deprive persons of their property without due process of law.

As we are not dealing, in this case, with regulations of municipal officers acting under delegated authority, but with an Act of Congress itself, it is unnecessary to review certain cases chiefly relied on in support of the contention; namely, St. Louis *vs.* Hitzeberg, 141 Mo, 375; St. Paul *vs.* Gilfillan, 36 Minn. 298; and State *vs.* Mott, 61 Md. 297. Those cases all involved the construction of the powers delegated to such officers, and it is clear that they would have no power to declare a thing a nuisance *per se* without express legislative authority at least. Yates *vs.* Milwaukee, 10 Wall. 497, 505."

The learned Justice then notices the constitutional provision applicable, and proceeds (page 434): "In a State, the citizen, in addition to the safeguards of its own constitution, is under the special protection of the Fourteenth Amendment; in the District of Columbia (in respect to the right here involved) he is under that of the Fifth." Again it is said (page 434): "In the exercise of this power of regulation, called the police power, there can be no doubt that the legislature has a very wide discretion, and may add to, or subtract from, the category of public nuisances recognized at

common law, moving in either direction, as the exigencies may suggest, under limitations not yet definitely settled." Further on in this opinion this language occurs (page 437): "A nuisance is public or private according to the extent or scope of its injurious effect."

"That which may constitute a private nuisance by reason of special injury to an adjacent or neighboring proprietor, may not amount to a general public nuisance. On the other hand, that may be a public nuisance, affecting injuriously the public or the public interests, whilst not operating a perceptibly special injury to one member of the community more than others.

Now, whilst the emission of the ordinary smoke from the chimneys of houses does not amount to a nuisance *per se*, it is nevertheless a matter of common knowledge, not to be ignored by the courts, that the emission of a volume of dense, black smoke from a single smokestack or chimney of a large furnace, may, under some circumstances, work physical discomfort to the general public coming within its circle of distribution upon public thoroughfares, and may possibly also work injury to public interests in other respects. Whenever it may become a special source of legal injury to an individual he will have an action of damages therefor, and, in cases of continuation, equity will afford complete relief by process of injunction. B. & P. R.R. Co. *vs.* Fifth Baptist Church, 108 U. S. 317, 329; Ross *vs.* Butler, 19 N. J. Eq. 294, 302; Duncan *vs.* Hayes, 22 N. J. Eq. 25.

In a large and growing community, conditions like those suggested and others, might well be apprehended to become widened in distribution, as well as increased in degree, through contributions to the volume of smoke made by other smokestacks or chimneys of like use. Charged with the duty of guarding the public interests, and vested, as we have seen, with wide discretion and liberty of choice in the means adapted thereto, Congress, it must be presumed, inquired

into and duly considered the effect, present and prospective, of the continued emission, constantly or at intervals, of dense black or gray smoke, upon those public interests in respect of safety, comfort and cleanliness.

And it must also be presumed that it apprehended and duly considered the probable injury to, or burden upon, private property, in such case, through the increased expense that may be involved in the use of smoke-consuming appliances, or, in case of their inefficiency, in the substitution of smokeless coal, coke or other fuel for the soft bituminous coal which produces the objectionable smoke.

The policy of adopting a regulation to meet the conditions is a matter peculiarly and exclusively within the province of the legislative department.

The judiciary can only interfere with the exercise of the power where it is manifest that the regulation has no real or substantial relation to objects within the police power, and constitutes a palpable invasion of private right. Powell *vs.* Pennsylvania, 127 U. S. 678, 686; Mugler *vs.* Kansas, 123 U. S. 623, 661; Crowley *vs.* Christensen, 137 U. S. 86, 91.

In the light of the principles stated, the statute does not appear, upon its face, to have been beyond the power of Congress to enact; hence the motion to quash, upon that ground, was rightly overruled.

Nor can we concur in the contention that the proviso, excluding from the application of the act 'chimneys of buildings used exclusively for private residences,' renders the statute void because of inequality and unjust discrimination. And the same may be said as regards the limitation of the prohibited smoke to its emission 'from any smokestack or chimney used in connection with any stationary engine, steam boiler or furnace.'

The Fourteenth Amendment, which prohibits the denial by a State of the equal protection of the law, does not, in its

terms, apply to the legislation of Congress; but, assuming that the same principle is, within the spirit of that and of the earlier amendments, intended to operate upon the legislation of Congress, we cannot regard the discriminations contained in the limitations and proviso aforesaid as having the effect charged.

The only inhibition upon the States is that the classification of persons and things shall not be arbitrary. If there be some reasonable basis for the classification made it is not obnoxious to the charge of denial of equality. G. C. & S. F. Rwy. Co. *vs.* Ellis, 165 U. S. 150, 155; Magoun *vs.* Ill. Trust and Savings Bank 170 U. S. 283, 294.

In the absence of facts sufficient to demonstrate that there can be no substantial distinction between the classes of engines, steam boilers and furnaces named in the act, and those specially excepted, it is not apparent that the classification made is without reasonable basis.

People *vs.* Lewis, 86 Mich. 273.

We can readily apprehend that there may be a very great difference between the quality and quantity of the smoke emitted from the chimneys of private dwellings, and from those connected with engines, steam boilers and furnaces used in buildings devoted to manufacturing purposes, or in the large buildings occupied by many persons, that require an immense consumption of fuel. It may well be that the fuel ordinarily consumed in one class of buildings is quite different from that consumed in the other, and that as a matter of fact the smoke emitted from the chimneys of one class may be injurious to the public and the other not.

The distinction made between stationary engines and portable ones would, on its face, likewise seem not to have an unreasonable foundation.

Probably the only portable engines in use would be fire engines steam rollers, and railway locomotives. Of the two

former it is sufficient to say that they are necessary agencies for the promotion and protection of paramount interests, and are in use for such necessary periods of time and in such places only as exigencies may demand.

The railway engine performs a different function. is confined to a space set apart for its use, and besides is not constantly engaged in diffusing its smoke from a permanent location. It may be presumed that these various conditions were also considered by Congress in the exercise of its discretion in the premises.

Special regulations relating to the uses of railway engines in this and other respects have often been made, and have generally been considered not to violate the rule of equality, because confined to them alone.

In a case following close upon that of Railway Co., *vs.* Ellis, before referred to, the Supreme Court of the United States held that an act of the legislature of New York, regulating the heating of railway passenger cars, was not arbitrary and unequal because railways less than fifty miles long were excepted from its operation. N. Y., etc. R. R. Co. *vs.* New York, 165 U. S. 628, 633."

Moses *vs.* United States, 16. App. Cases D. C. 437-440.

The jurisdiction of Congress respecting the District of Columbia, in matters municipal as well as political, is exclusive, and not controlled by the provisions of the 14th Amendment. No doubt, in the exercise of such legislative powers, Congress is subject to the provisions of the 5th Amendment to the Constitution of the United States, which provide, among other things, that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.

Wight *vs.* Davidson, 181 U. S. 384.

The United States possesses complete jurisdiction, both of a

political and municipal nature, over the District of Columbia. Parsons *vs.* District of Columbia, 170 U. S. 52.

But whether the constitutional objection to the Act of Congress under consideration be based on the 5th Amendment or the 14th Amendment or on both Amendments, we maintain that the nature of the subject matter precludes any effective argument that Congress in declaring dense smoke a public nuisance acted arbitrarily, and we claim that Congress did no more than *regulate* what in itself in the City of Washington was or might become a serious public inconvenience affecting the health and property of the whole community.

There is no evidence in this case that the plaintiff in error ever made the slightest attempt to comply with the law by properly firing the furnaces by machinery or by hand or that there were any sort of smoke devices connected with the furnaces or that there had ever been expended or lost a single penny by reason of the enactment of this statute. Speaking of the 14th amendment to the Constitution this court said in Barbier *vs.* Connolly, 113 U. S. 27 (L. ed. Book 28 at page 925).

"But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its "police power" to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations

for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.

In the execution of admitted powers unnecessary proceedings are often required which are cumbersome, dilatory and expensive, yet if no discrimination against anyone be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State."

It would seem that the location of the plant of the U. S. Electric Company in the immediate proximity to Public Buildings and frequented and busy streets is a situation which does not permit the plaintiff in error to assert that discrimination contrary to law exists as to him. This question does not affect him however it may be as to others located in the sparsely settled sections of the District of Columbia. An eminent legal author states: "Nor will a court listen to an objection made to the constitutionality of an Act by a party whose rights it does not affect, and who has therefore no interest in defeating it."

Cooley's Const. Lim., side p. 163.

We respectfully submit that if this court has jurisdiction to determine in this case that the Act of Congress of February 2,

1899, is valid as an Exercise of Police Power and that the decision of the Court of Appeals should be affirmed.

A. B. DUVALL,
E. H. THOMAS,
Attorneys for the District of Columbia.

Supreme Court of the United States.

No. 94.—October Term, 1903.

Lindley E. Sinclair, Plaintiff in Error, vs. The District of Columbia. } In error to the Court of Appeals of the District of Columbia.

[January 4, 1904.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

Plaintiff in error was prosecuted by information in the Police Court of the District of Columbia, for a violation of an act of Congress, approved February 2, 1899, entitled "An act for the prevention of smoke in the District of Columbia, and for other purposes," (30 Stat. 812, c. 79,) and was found and adjudged guilty, and sentenced "to pay a fine of fifty dollars and in default to be committed to the workhouse for the term of ninety days." The judgment was affirmed by the Court of Appeals of the District of Columbia, 20 D. C. App. 336, brought here on error, and argued on the merits and on motion to dismiss.

The Court of Appeals of the District of Columbia was established by an act of Congress, approved February 9, 1893, (27 Stat. 434, c. 74,) section 8 of which was as follows:

"That any final judgment or decree of the said Court of Appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the Supreme Court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States."

On March 3, 1901, an act "to establish a code of law for the District of Columbia," 31 Stat. 1189, c. 854, was approved, (and subsequently amended by acts approved January 31 and June 30, 1902, 32 Stat. 2, c. 5; 32 Stat. 520, c. 1329,) section 233 of which provides that—

"Any final judgment or decree of the Court of Appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in

cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

It will be perceived that section 8 of the one act and section 233 of the other are in substance the same, and they must bear the same construction. And the ruling in *Chapman* v. *United States*, 164 U. S. 436, in respect of section 8, is decisive to the point that this writ of error cannot be maintained.

That case, as stated by the court, was this:

"Chapman was indicted in the Supreme Court of the District of Columbia for an alleged violation of section 102 of the Revised Statutes, in refusing to answer certain questions propounded to him by a special committee of the Senate of the United States, appointed to investigate charges in connection with proposed legislation then pending in the Senate. To this indictment the defendant demurred on the ground, among others, that section 102 of the Revised Statutes was unconstitutional, and that, therefore, the court was without jurisdiction in the premises. This demurrer was overruled by the trial court and its judgment thereon affirmed by the Court of Appeals of the District. 5 D. C. App. 122. Defendant was thereupon tried and convicted, and motions for new trial and in arrest of judgment having been made and overruled (the question of the constitutionality of section 102 being raised throughout the proceedings), was sentenced to be imprisoned for one month in jail and to pay a fine of one hundred dollars, which judgment was affirmed on appeal. 24 Wash. Law Rep. 251. (8 D. C. App. 302.) A writ of error from this court was then allowed, 24 Wash. Law Rep. 297, (8 D. C. App. 320,) which the United States moved to dismiss."

It was held that this court had no jurisdiction to review on writ of error a judgment of the Court of Appeals of the District of Columbia in a criminal case under section eight of the act of February 9, 1893; and the writ of error was accordingly dismissed. Attention was called to the fact that it had been previously decided that the court had no jurisdiction to grant a writ of error to review the judgments of the Supreme Court of the District of Columbia in criminal cases either under the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, *In re Heath*, 144 U. S. 92; or under the act of February 6, 1889, c. 113, 25 Stat. 655, *Cross* v. *United States*, 145 U. S. 571; or on *habeas corpus*, *Cross* v. *Burke*, 146 U. S. 82. And although the validity of any patent or copyright, or of a treaty or statute of, or an authority exercised under, the United States, was not drawn in question in those cases, it was distinctly ruled in reaching the conclusions announced that neither of the sections of the act of March 3,1885, applied to any criminal case; and *Farnsworth* v. *Montana*, 129 U. S. 104; *United States* v. *Sanges*, 144 U. S. 310, and *United States* v. *More*, 3 Cranch 159, were cited with approval.

We were of opinion that section eight of the act establishing the Court of Appeals of the District of Columbia, and the act of March 3, 1885, c. 55, 23 Stat. 443, were the same in their meaning and legal effect. The first section of the act of 1885 prohibited appeals or writs of error unless the matter in dispute exceeded the sum of five thousand dollars, but the second section provided that the restriction should not apply to cases wherein the validity of any patent or copyright was involved, or where the validity of a treaty or statute of or an authority exercised under the United States was drawn in question, and that in all such cases an appeal or writ of error might be brought without regard to the sum or value in dispute. And it was ruled that the last clause of section eight of the act of 1893 must receive the same construction as had been given to the second section of the act of 1885. We said: "The meaning of both statutes is that in the cases enumerated the limitation on the amount is removed, but both alike refer to cases where there is a pecuniary matter in dispute, measurable by some sum or value, and they alike have no application to criminal cases."

United States v. *More*, 3 Cranch, 159, was cited to the main proposition and was quoted from in respect of the suggestion that because the punishment on conviction by the statute under which plaintiff in error was indicted, tried and convicted embraced a fine, there was therefore a sum of money in dispute. The case involved section eight of the act of February 27, 1801, c. 15, entitled "An act concerning the District of Columbia," 2 Stat. 103, and creating a Circuit Court for the District of Columbia, which provided "that any final judgment, order or decree in said Circuit Court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined and reversed or affirmed in the Supreme Court of the United States, by writ of error or appeal. . . ." It was held that this court had no jurisdiction under that section over the judgments of the Circuit Court of the District of Columbia in criminal cases, and Chief Justice Marshall said: "On examining the act 'concerning the District of Columbia,' the court is of opinion, that the appellate jurisdiction granted by that act, is confined to civil cases. The words, 'matter in dispute,' seem appropriated to civil cases, where the subject in contest has a value beyond the sum mentioned in the act. But, in criminal cases, the question is the guilt or innocence of the accused. And although he may be fined upwards of one hundred dollars, yet that is, in the eye of the law, a punishment for the offense committed, and not the particular object of the suit."

And the previous ruling that section five of the judiciary act of 1891 had no application was repeated.

Chapman's case was decided November 30, 1896, and on the third of March, 1897, an act was approved which authorized this court to issue writs of certiorari in cases made final in that court to bring them up for

review and determination. 29 Stat. 692, c. 390. This was carried forward into section 234 of the District Code, and in the meantime we had reviewed the judgment of the Court of Appeals in certain criminal cases on certiorari granted under the act. *Winston* v. *United States*, 172 U. S. 303; 171 U. S. 690.

The rule that applies to capital cases and infamous crimes applies to the criminal offenses over which the police court of the District of Columbia exercises jurisdiction, and under that rule this writ of error must be

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.